THE INTERNATIONAL RULE OF LAW ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1434

A BILL TO ELIMINATE THE BAR OF THE ACT OF STATE DOCTRINE TO ADJUDICATION ON THE MERITS IN CERTAIN CASES IN UNITED STATES COURTS

SEPTEMBER 14, 1981

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THE INTERNATIONAL RULE OF LAW ACT

MONDAY, SEPTEMBER 14, 1981

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 1:45 p.m., in room 2228, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Also present: Senator Specter.

Staff present: Ralph Oman, staff director of Criminal Law Subcommittee; Carolyn Lewis, professional staff member; Linda Colancecco, professional staff member; Charles Borden, professional staff member; Peggy Williams, professional staff member; Bruce Cohen, counsel to Senator Specter; Miriam Mills, counsel to Senator Specter; Arthur Briskman, counsel to Senator Heflin; Paula Argento, legislative staff of Senator Heflin; and Craig Stern, counsel to Senate Subcommittee on Separation of Powers.

OPENING STATEMENT OF CHAIRMAN MATHIAS

Senator MATHIAS. The committee will come to order.

I am glad that on the second try we are able to get together for this, and I want to apologize to those of you who were here before for the hearing which unfortunately had to be called off.

In the last Congress I joined with the Senator from New Mexico, Mr. Domenici, in introducing this bill to limit the act of state doctrine because we both felt that it was an anachronism which is limiting the U.S. courts and which is working to the disadvantage of U.S. interests around the world.

I think it is generally known that under the doctrine, the U.S. courts refuse to sit in judgment on the question of the legality of the acts of foreign governments, either in terms of international law, or in terms of the country's domestic law. Rather than judge the validity of foreign acts of state, the courts today just automatically, out of hand, dismiss the cases.

The purpose of this bill is to limit the act of state doctrine and to allow U.S. courts to hear cases that allege that the act of a foreign government in question does in fact violate international law. And the bill would direct judges to decide these cases that are before their courts according to all the relevant law, including international law. And it would therefore, at least in my judgment, put our courts in step with the courts of countries with advanced legal systems all around the world, and it would permit the United States, to the limited extent that is possible in our legal system, to participate in the development and in the application of international law.

The most notorious examples in recent history date from the Cuban expropriation of the assets of U.S. citizens after Fidel Castro took over that Government in 1959.

One of our witnesses, Mr. Rabinowitz, represented Cuba in some of the subsequent litigation. Even though the takeovers were generally acknowledged to be confiscatory and generally acknowledged to be discriminatory, and thus to have violated the accepted standards of international law, the U.S. courts dismissed the otherwise valid claims of the expropriated Americans trying to attach Cuban assets in the United States. Hiding behind the skirts of the act of state doctrine, the courts refused to sit in judgment on the validity of Castro's expropriation under international law.

In the 20 years that have elapsed since the Castro expropriation of American property, the act of state doctrine has been the source of continuing confusion.

Today the world is crowding in on us in an unprecedented way, and some of the confusion which results from a period of change such as that which we are now living through makes it possible for governments to exploit helpless aliens and to issue expropriation decrees that are obviously discriminatory. By their very abstention, the U.S. courts encourage violations of human rights and international law. The confused doctrine of judicial abstention appears to be harmful to us, and I think it very clearly is harmful to individual men and women who are denied redress in the courts.

Having adopted a practice whose roots go back to English law in the 17th century, our courts have not adapted it to 20th century America. They have refuted Mr. Justice Frankfurter's statement that "No court can make time stand still."

It seems to me that we should consider freeing the courts from the restraint and allowing them to decide cases that actually need adjudication. To do this will harmonize our practice with the rest of the civilized world.

Our witnesses have a great deal of expertise in international law and in the act of state doctrine, and I expect that they will address some of the problems raised by the absolute application of the doctrine.

Because of time restraints, I am requesting that each witness limit testimony to 10 minutes. However, we will be very liberal about allowing the balance of the statement, the full statement, to be printed in the record in full as if delivered. And I hope that as we go along and as different points are raised, that each of the subsequent witnesses will be able to respond to the points that are raised by the preceding witnesses.

And the witnesses in fact have been scheduled to appear in a sequence that will, to the extent that we can predict your views and your positions, give rise to a kind of continuing dialog.

We will hold the hearing record open for 3 weeks which will give parties who are not able to be here today an opportunity to put their views on the record.

Before we begin with the first witness, I wish to place a copy of S. 1434 into the record.

[The bill, S. 1434, follows:]

97TH CONGRESS
1ST SESSION

S. 1434

To eliminate the bar of the act of state doctrine to adjudication on the merits in certain cases in United States courts.

IN THE SENATE OF THE UNITED STATES

JUNE 25 (legislative day, JUNE 1), 1981

Mr. MATHIAS (for himself and Mr. DOMENICI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To eliminate the bar of the act of state doctrine to adjudication on the merits in certain cases in United States courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "International Rule of Law Act".

SEC. 2. FINDINGS AND DECLARATION OF PURPOSE.

The Congress finds and declares that the act of state doctrine should not be invoked to preclude the application of international law, including international law concerning the protection of persons and property; and that the act of state doctrine is conceptually and legally separate and distinct from the defense of "foreign sovereign compulsion". The Congress further declares that it is the purpose and intent of this Act to eliminate any bar of the act of state doctrine to the application of international law in the determination of the merits of any case.

SEC. 3. RESTRICTIONS ON THE ACT OF STATE DOCTRINE.

Title 28, chapter 111, United States Code, is amended by inserting after section 1656 the following new section:

"§ 1657. Elimination of the act of state doctrine in certain cases

"No court in the United States shall decline on the ground of the Federal act of state doctrine to make a determination on the merits in any case in which the act of state is contrary to international law.".

SEC. 4. APPLICATION OF INTERNATIONAL LAW.

(a) For purposes of this section, international law shall mean the law referred to in article 38 of the Statute of the International Court of Justice as further refined by such Acts of Congress heretofore or hereafter adopted to clarify principles of international law to be applied to United States courts, administrative bodies, and executive officers.

(b) In any case involving a violation of international law by a foreign state with respect to the personal, property, or contractual rights of a person not a national of that state, courts in the United States in deciding such cases shall apply principles and rules of international law.

SEC. 5. FOREIGN SOVEREIGN COMPULSION DEFENSE.

Nothing in this Act shall be deemed to modify the foreign sovereign compulsion defense, which shall continue to remain fully available in United States courts.

SEC. 6. REPEAL OF OTHER ACT: EFFECTIVE DATE.

(a) Effective on the date of enactment of this Act, section 620(e)(2) of the Foreign Assistance Act of 1961, as amended (title 22, chapter 32, section 2370(e)(2)) is repealed.

(b) The provisions of this Act shall become effective on the date of its enactment and shall apply to all cases where a final judgment has not been rendered.

Senator MATHIAS. As the first witness, we will call to the witness table Mr. Davis Robinson, Legal Adviser to the Department of State.

Mr. Robinson, it is an honor to welcome you once again to the committee.

STATEMENT OF HON. DAVIS R. ROBINSON, LEGAL ADVISER OF THE DEPARTMENT OF STATE

Mr. ROBINSON. Thank you, Mr. Chairman, very much.

It is indeed a pleasure to be with you today. As you may know, this is my first appearance before a congressional committee since assuming my official duties as the Legal Adviser. It is only appropriate, I think, that my initiation into this valuable consultative process should come during reconsideration of the act of state doctrine, perhaps the most written about topic in international law journals in this country since the Supreme Court's landmark decision in the *Sabbatino* case. The act of state doctrine, I believe, is also one of the most complex topics addressed by those with an interest in international affairs. I look forward to learning a great deal from the remarks by the other witnesses, and commend your effort to examine thoroughly the public policy issues raised by this judicial doctrine.

Since I am the leadoff witness today, I thought it might be appropriate to begin with a brief review of the act of state doctrine before addressing myself to the specifics of S. 1434.

BASIS FOR ACT OF STATE DOCTRINE

Act of state has traditionally been regarded as a doctrine of judicial abstention. Where applicable, it precludes examination by U.S. courts into the validity of governmental acts by foreign states committed within their own territories. While initially the doctrine may have derived from concern for territorial sovereignty, the Supreme Court's *Sabbatino* decision in 1964 grounded the doctrine on the need to insure "the proper distribution of functions between the judicial and political branches of Government on matters bearing upon foreign affairs." The Court expressed this separation of powers concern in two basic ways: First, by noting that the judiciary may lack the competency "to make and implement particular kinds of decisions affecting international relations," for example, when international standards have not yet developed to provide a rule of decision; and second, by predicting that pronouncements on the validity of a foreign state's acts in particular circumstances might hinder rather than assist the political branches in discharging their constitutional responsibility for conducting the country's foreign relations.

As articulated in *Sabbatino,* the act of state doctrine was to be a flexible tool for achieving the optimal role for the courts in foreign affairs in light of these concerns. Justice Harlan's opinion for eight members of the Court advised the lower courts to make a careful assessment of whether standards for adjudication are lacking, and whether a concrete risk to foreign affairs is posed, before exercising their power of judicial abstention. On the facts of *Sabbatino,* however, the Court ruled that the act of state doctrine barred review of the legality of Cuba's expropriation of American property. The decision also seemed to foreclose review of similar expropriations elsewhere.

"SABBATINO AMENDMENT"

Congress reacted to this aspect of the decision swiftly and negatively by enacting the so-called *Sabbatino* amendment to the Foreign Assistance Act. This amendment, which would be supplanted by S. 1434, bars reliance on the act of state doctrine in specified expropriation cases, unless the President determines that application of the doctrine is required by the foreign policy interests of the United States. To my knowledge, the amendment has only been found applicable in one case, *Sabbatino* itself on remand, perhaps because of the narrow language used to describe which expropriation cases are covered by the amendment.

CASES INVOLVING EXPROPRIATIONS

Since *Sabbatino,* the cases in which act of state has played a significant role seem to have fallen generally into three distinct classes. First are the expropriation cases. The Supreme Court twice, in *First National City Bank* in 1972 and in *Alfred Dunhill of London* in 1976, has been faced with complex fact patterns arising out of the Cuban expropriations, and both times has been unable to advance or modify the *Sabbatino* analysis with a majority opinion. In this context, some lower courts have continued to refuse to adjudicate cases involving expropriations, despite U.S. policy in favor of full compensation and the executive branch position in those cases that the doctrine need not have been applied.

ANTITRUST CASES

A second category of cases has involved antitrust litigation. These cases, unlike the expropriation cases, do not normally involve issues of international law. Sometimes the foreign government is the defendant, and sometimes the government is merely involved in the events which allegedly caused plaintiff's injury, and a private party is the defendant. For example, the plaintiff might charge that the defendant corporation caused the foreign government to revoke plaintiff's import license. In this latter group of cases, the courts have not applied the act of state doctrine uniformly. The ninth circuit, for example, has carefully inquired whether adjudication would have repercussions on foreign relations before deciding whether to apply the act of state doctrine. The second circuit, on the other hand, has somewhat rigidly applied the act of state doctrine to forbid any inquiry into the motive behind foreign government acts on the theory that such inquiries would inevitably bring into question the validity of such acts.

HUMAN RIGHTS CASES

Finally, a third and quite distinct category of cases concerns instances of alleged human rights abuses by foreign governments where the victims seek relief from U.S. courts. Perhaps most notable is the recent second circuit opinion in the *Filartiga* case, permitting a suit against a former Paraguayan police official by the survivors of the official's alleged torture victim. In *Filartiga,* the court sidestepped the issue of act of state, but it expressed skepticism that an action by a government official contrary to Paraguay's own law, without further evidence of governmental ratification, could be considered an act of state. Had the court decided that an act of state had occurred and weighed the different factors outlined in the *Sabbatino* decision, it may well have reached the conclusion that abstention on act of state grounds was unnecessary.

BROAD SWEEP OF S. 1434

This brief overview of the terrain should give an idea of the diversity of situations which the courts have had to grapple with in administering the act of state doctrine. As I understand S. 1434, it seeks to sweep most of these difficulties aside by withdrawing from the courts in all cases the authority to abstain on act of state grounds from reviewing foreign governmental conduct under international law.

Let me say that I share some of the bill's concerns because I believe the act of state doctrine as it has been interpreted by some courts in some cases has unnecessarily prevented the courts from adjudicating claims properly before them. On the other hand, I approach the bill with a sense of caution because of the sheer diversity of the cases we are talking about. I am not convinced that this universe of cases is very large, but it does contain a variety of different issues that arise in circumstances of varying foreign policy sensitivity. I think it should be considered whether a single legislative solution will be sufficiently sensitive to the special circumstances affecting each of the different areas. Let me elaborate a bit on each of these points.

POSSIBLE COMMERCIAL EXCEPTION

A major premise of the *Sabbatino* decision was that the courts should not rule on the legality of foreign governmental conduct where to do so would risk interference with the conduct of foreign policy. One example the Court clearly had in mind was the adjudication of disputes which the political branches have determined to resolve through diplomatic means. The reverse side of this principle is that where the political branches have determined that judicial resolution is the proper method for dealing with claims against a foreign government, and standards for adjudication are available, then the act of state doctrine ought not frustrate that policy.

In light of these principles, one area worth investigating further is whether the act of state doctrine should be applied when a foreign government has acted in a purely commercial capacity. Since 1952, the Department of State has adhered to the position that the commercial activities of foreign states do not give rise to sovereign immunity. In 1976 this principle was codified in the Foreign Sovereign Immunities Act. One of my predecessors in the Legal Adviser's Office has stated, and I quote:

> Implicit in this position is a determination that adjudication of commercial liability against foreign states does not impede the conduct of foreign relations, and that such adjudications are consistent with international law.

I think this is a topic worth exploring further in connection with S. 1434, and in that connection, I believe attention should be given to Judge Choy's remarks on this subject in the recent *International Association of Machinists* v. *OPEC* case, as well as the conflicting opinions in the *Dunhill* decision.

ADVERSE CONSEQUENCES FROM UNNECESSARY ABSTENTION

When the courts refuse to decide issues of international law properly presented to them, they forgo the opportunity to apply international law where it provides an appropriate basis for decision. They may also fail to do justice to the parties before them. And, significantly from our perspective, the refusal to pass on questions of foreign governmental conduct may actually frustrate important foreign policy objectives. The State Department has previously expressed this latter concern in the series of cases growing out of Libyan expropriations of oil concessions when several courts applied the act of state to bar adjudication of the expropriations.

CASES WHERE ABSTENTION MAY BE NECESSSARY

At the same time, however, I think it is only prudent to proceed cautiously when considering as sweeping a proposal as S. 1434 to limit the act of state doctrine. There is little doubt that in many cases embarrassment or interference in the conduct of foreign affairs would not result if U.S. courts were to review the validity of foreign acts of state under international law. But I am personally concerned that there may remain cases where judicial abstention would be appropriate on foreign policy grounds. One possible example is when the executive branch has adopted a position of neutrality toward an international dispute, for instance, when there are claims over particular territory.

I see that I have exceeded my time. If I could have maybe another minute or so, I should be able to finish, Senator Mathias.

Senator MATHIAS. You may take the extra time.

Mr. ROBINSON. Thank you, Mr. Chairman.

If the courts were compelled to pass on the validity of either or both of the territorial claims in the context of a private lawsuit, their action could vitiate the executive's foreign policy decision to refrain from commenting on the merits of the dispute.

Another example is when the political branches have determined that diplomatic negotiations afford the best opportunity for achieving satisfaction of the interests of a group of American citizens. To preclude the courts absolutely from abstaining on act of state grounds in the scattered, individual cases that might be brought, despite the decision to proceed diplomatically, could jeopardize the entire settlement process.

RELATIONSHIP TO POLITICAL QUESTION DOCTRINE

Perhaps in cases like these, other doctrines of abstention, such as the political question doctrine, might remain available to the courts under S. 1434. Because of the uncertainty concerning the relationship of the act of state to the political question doctrine, however, S. 1434 could be interpreted to affect the application of both doctrines in a particular case. Attempting to modify the political question doctrine might provoke a confrontation with the judiciary which has its own interests to protect in rejecting nonjusticiable cases.

NEED TO PRESERVE FLEXIBILITY

As members of this committee are aware, the *Sabbatino* amendment as presently written permits the courts to abstain in cases where "the President determines that application of the act of state doctrine is required by the foreign policy interests of the United States." I would suggest that if the committee favors a general limitation of the act of state doctrine as in S. 1434, further consideration should be given to including a provision granting similar flexibility in order to insure that the courts and the executive are not precluded from accommodating the significant foreign policy interests that might be affected in a particular instance.

Mr. Chairman, I have included several technical concerns in my remarks. If I may, I will leave those additional comments for the record. I certainly in closing would like to thank you and the committee for affording me this opportunity to appear. I look forward to continued close cooperation in the examination of topics of mutual concern. I would be very happy to address any questions that you may have.

I thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Robinson.

In your extra minute, you speculated a little bit as to what it would be like to live in an environment without the act of state doctrine. But, in fact, a great many other nations, perhaps the majority of other nations, do live in an environment without an act of state doctrine, and I am wondering how these nations operate in the absence of such a doctrine.

Mr. ROBINSON. Thank you, Mr. Chairman.

Let me say first that that is not an issue that I have had a personal opportunity to look into thoroughly, but I will certainly do so.

I might say my understanding is that there have been relatively few cases in other countries where jurisdiction has been exercised over foreign acts of state. I further have been led to believe that in the expropriation area, however, many would not apply an act of state doctrine in the cases where our courts have applied the doctrine.

The *Sabbatino* amendment, as I understand it, was intended to remedy this discrepancy, but has been seldom applied.

My further understanding is that in other areas—for example, in the case of antitrust—the act of state issue has rarely if ever arisen because other nations are more reluctant than we are in the application of their own laws to international transactions. I know that this matter is the subject of a further bill in which we are certainly interested involving the application of U.S. laws abroad. In sum, other nations I gather have not applied the act of state concept as often in the antitrust area.

Now, I would be very happy, let me say, to follow that up with a more thoughtful written response.

Senator MATHIAS. I think that would be very helpful if you could do that.

Mr. ROBINSON. Thank you, Mr. Chairman. I would be happy to do that.

[The information referred to follows:]

Additional Statement on Foreign Practices

The Committee might wish to take note of the discussion found in the Restatement (Second) on Foreign Relations Law of the United States at §41, note 2 (1965). It indicates that at least as of the date of that writing many European courts applied act of state or an analogous doctrine to preclude review of foreign governmental acts within the territory of the governments in question. Similar observations are to be found in "Act of State Doctrine," 12 ALR Fed 712-13 (1972).

The Restatement points out, however, that some European courts have developed a "public policy" exception to their application of the act of state (or analogous) doctrine, particularly in cases of expropriation of private property in violation of international law. See Restatement §41, note 4. See also Letter from Monroe Leigh, Legal Adviser, to the Solicitor General, Nov. 26, 1975, reprinted at 425 U.S. 706, 709-10, n. 2-3 (1976). These exceptions, along with the different doctrinal foundations underlying European act of state practice, make it intrinsically difficult to draw direct comparisons between their experience and our own. See, e.g., Singer, "The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice," 75 American Journal of International Law 283 (1981) [Singer]. It would appear from these and other materials, however, that a broad generalization to the effect that act of state is a concept alien to other legal systems is unwarranted. In some cases, foreign courts have declined and continue to decline to adjudicate claims challenging foreign acts of state for reasons that coincide, in varying degrees, with the reasons underlying the American act of state doctrine. See Singer, supra, at 319-322; Petersmann, "Act of State Doctrine, Political Question Doctrine und gerichtliche Kontrolle der auswärtigen Gewalt [and Judicial Oversight of Foreign Action]," 25 Jahrbuch des öffentlichen Rechts der Gegenwart [Yearbook of Current Public Law] 587, 590 (1976).

Senator **Mathias**. Now, you raised the question of whether the judiciary would be accused of meddling in the area of executive action in determining foreign policy in particular, and I think perhaps you have answered that yourself by suggesting that the doctrine of political question might be resorted to as a means of giving the courts some flexibility.

Can you think of any other methods that might be used by the courts to handle that particular problem which could arise in the absence of the act of state doctrine?

Mr. **Robinson**. Senator Mathias, I might there comment that I believe one of our concerns which is reflected in our technical comments is that the removal of the act of state doctrine pursuant to a statutory mandate might somehow jeopardize the political question issue. This concern should justify further thought as to whether in legislatively addressing the act of state doctrine, the judiciary might also be impacted in other areas such as with regard to political questions and, for example, possibly comity.

That may not be responsive to your direct question. However, I believe that this is an area where further thought may be advisable before proceeding with the bill.

Senator **Mathias**. And of course, that is the purpose of having this hearing and getting the views of a number of people, to do exactly that.

But assuming that we can be satisfied on that point, would I be off the mark in saying that I presume from your testimony that the Department of State would have no serious objection to passage of this bill?

Mr. **Robinson**. Mr. Chairman, I am not sure that I can respond affirmatively to that in that I believe that the elements which go into the act of state doctrine are not necessarily the same as the elements which go into, let's say, the political question issue.

Our concern at the moment is whether the act of state doctrine should have some remaining life in certain instances. For example, over the weekend I read with some care the recent *International Association of Machinists* v. *OPEC* case, where I gather the court made the decision to sidestep whether there was an exemption under the Foreign Sovereign Immunities Act because of the commercial activity exception, and instead found the act of state doctrine particularly useful under those particular facts. And I found myself, at least on this early reading of the case, to be persuaded the facts in that case were an instance where the act of state doctrine was a valid consideration.

Senator **Mathias**. Well, when you send us the other information to us, perhaps if you have any further thoughts on that question, you would add them.

Mr. **Robinson**. I would be very happy to do that, Senator Mathias.

Senator **Mathias**. Thank you very much.

Mr. **Robinson**. Thank you, Mr. Chairman, very much.

[The prepared statement of Mr. Robinson follows:]

Testimony of Davis R. Robinson, Legal Adviser
of the Department of State on S. 1434 -- the
"International Rule of Law Act" -- before the
Senate Judiciary Subcommittee on Criminal Law,
September 14, 1981

Thank you, Mr. Chairman.

It is indeed a pleasure to be with you today. As you may know, this is my first appearance before a Congressional Committee since assuming my duties as Legal Adviser. It is only appropriate, I think, that my initiation into this valuable consultative process should come during reconsideration of the act of state doctrine -- perhaps the most written-about topic in international law journals in this country since the Supreme Court's landmark decision in the Sabbatino case.1/ The act of state doctrine, I believe, is also one of the most complex topics addressed by those with an interest in international affairs. I look forward to learning a great deal from the remarks by the other witnesses, and commend your effort to examine thoroughly the public policy issues raised by this judicial doctrine.

Since I am the lead-off witness today, I thought it might be appropriate to begin with a brief review of the act of state doctrine before addressing myself to the specifics of S. 1434.2/

Act of state has traditionally been regarded as a doctrine of judicial abstention.3/ Where applicable, it precludes examination by U.S. courts into the validity of governmental acts by foreign states committed within their own territories.4/

1/ Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

2/ 127 Cong. Rec. 7120 (1981).

3/ See, e.g., Restatement (Second) on Foreign Relations Law of the United States § 41 (1965).

4/ See, e.g., Underhill v. Hernandez, 168 U.S. 250 (1897).

While initially the doctrine may have derived from concern for territorial sovereignty,5/ the Supreme Court's Sabbatino decision in 1964 grounded the doctrine on the need to ensure "the proper distribution of functions between the judicial and political branches of government on matters bearing upon foreign affairs."6/ The court expressed this separation of powers concern in two basic ways: first, by noting that the judiciary may lack the competency "to make and implement particular kinds of decisions [affecting] international relations,"7/ for example when international standards have not yet developed to provide a rule of decision; and, second, by predicting that pronouncements on the validity of a foreign state's acts in particular circumstances might hinder rather than assist the political branches in discharging their constitutional responsibility for conducting the country's foreign relations.8/

As articulated in Sabbatino the act of state doctrine was to be a flexible tool for achieving the optimal role for the courts in foreign affairs in light of these concerns. Justice Harlan's opinion for eight members of the Court advised the lower courts to make a careful assessment of whether standards for adjudication are lacking, and whether a concrete risk to foreign affairs is posed, before exercising their power of judicial abstention.9/ On the facts of Sabbatino, however, the Court ruled that the act of state doctrine barred review of the legality of Cuba's expropriation of American property. The

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5/ See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Underhill, supra, 168 U.S. at 252.

6/ 376 U.S. at 428.

7/ Id. at 433.

8/ Id. at 423, 432.

9/ Id. at 428.

decision also seemed to foreclose review of similar expropriations elsewhere.10/ Congress reacted to this aspect of the decision swiftly, and negatively, by enacting the "Sabbatino" amendment to the Foreign Assistance Act.11/ This amendment, which would be supplanted by S. 1434, bars reliance on the act of state doctrine in specified expropriation cases, unless the President determines that application of the doctrine is required by the foreign policy interests of the United States. To my knowledge, the amendment has only been found applicable in one case -- *Sabbatino* itself on remand12/ -- perhaps because of the narrow language used to describe which expropriation cases are covered by the amendment.13/

Since *Sabbatino*, the cases in which act of state has played a significant role seem to have fallen generally into three distinct classes. First, are the expropriation cases. The Supreme Court twice -- in *First National City Bank*14/ in 1972 and in *Alfred Dunhill of London*15/in 1976 -- has been faced with complex fact patterns arising out of the Cuban expropriations, and both times has been unable to advance or modify the *Sabbatino* analysis with a majority opinion. In this context,

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10/ *Id*.

11/ 22 U.S.C. § 2370(e)(2) (1976).

12/ Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

13/ *See*, *e.g.*, Occidental of Umm Al Qaywayn, Inc. v. Cities Services Oil Co., 396 F. Supp. 461, 472 (W.D. La. 1975); F. Palicioy Compania, S.A. v. Brush, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967).

14/ First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

15/ Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976).

some lower courts have continued to refuse to adjudicate cases involving expropriations, despite United States policy in favor of full compensation and the Executive Branch position in those cases that the doctrine need not have been applied.16/

A second category of cases has involved antitrust litigation. These cases, unlike the expropriation cases, do not normally involve issues of international law. Sometimes the foreign government is the defendant,17/ and sometimes the government is merely involved in the events which allegedly caused plaintiff's injury, and a private party is defendant. For example, the plaintiff might charge that the defendant corporation caused the foreign government to revoke plaintiff's import license.18/ In this latter group of cases, the courts have not applied the act of state doctrine uniformly. The Ninth Circuit, for example, has carefully inquired whether adjudication would have repercussions on foreign relations before deciding whether to apply the act of state doctrine.19/ The Second Circuit, on the other hand, has somewhat rigidly applied the act of state doctrine to forbid any inquiry into the motive behind foreign government acts on the theory that such inquiries would inevitably bring into question the validity of such acts.20/

16/ E.g., Hunt v. Coastal States Gas Producing Co., 583 S.W. 2d 322 (Tex.), cert. denied, 444 U.S. 92 (1979).

17/ E.g., Int'l. Assoc. of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

18/ E.g., Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977).

19/ See, e.g., Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

20/ See, e.g., Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), cert. den., 423 U.S. 904 (1977); Bokkelen v. Grumman Aerospace Corp., supra.

Finally, a third and quite distinct category of cases concern instances of alleged human rights abuses by foreign governments where the victims seek relief from U.S. courts. Perhaps most notable in this regard is the recent Second Circuit opinion in the Filartiga case,21/ permitting suit against a former Paraguayan police official by the survivors of the official's alleged torture victim. In Filartiga, the court side-stepped the issue of act of state, but it expressed skepticism that an action by a government official contrary to Paraguay's own law without further evidence of governmental ratification could be considered an act of state.22/ Had the court decided that an act of state had occurred, and weighed the different factors outlined in the Sabbatino decision, it may well have reached the conclusion that abstention on act of state grounds was unnecessary.

This brief overview of the terrain should give an idea of the diversity of situations which the courts have had to grapple with in administering the act of state doctrine. As I understand S. 1434, it seeks to sweep most of these difficulties aside by withdrawing from the courts in all cases the authority to abstain on act of state grounds from reviewing foreign governmental conduct under international law. Let me say that I share some of the bill's concerns because I believe the act of state doctrine as it has been interpreted by some courts in some cases has unnecessarily prevented the courts from adjudicating claims properly before them. On the other hand, I approach the bill with a sense of caution because of the sheer diversity of the cases we are talking about. I am not convinced this universe of cases is very large, but it does contain a variety of different issues that arise in circumstances of varying foreign policy sensitivity. I think it should be considered whether a single legislative solution will be sufficiently sensitive to the special circumstances affecting each of the different areas. Let me elaborate a bit on each of these points.

A major premise of the Sabbatino decision was that the courts should not rule on the legality of foreign governmental conduct where to do so would risk interference with the conduct of foreign policy. One example the court clearly had in

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21/ Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

22/ 630 F.2d at 889-90.

mind was the adjudication of disputes which the political branches have determined to resolve through diplomatic means.23/ The reverse side of this principle is that where the political branches have determined that judicial resolution is the proper method for dealing with claims against a foreign government, and standards for adjudication are available, then the act of state doctrine ought not frustrate that policy.

In light of these principles, one area worth investigating further is whether the act of state doctrine should be applied when a foreign government has acted in a purely commercial capacity. Since 1952, the Department of State has adhered to the position that the commercial activities of foreign states do not give rise to sovereign immunity.24/ In 1976, this principle was codified in the Foreign Sovereign Immunities Act.25/ One of my predecessors in the Legal Adviser's Office has stated, "implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law."26/ I think this is a topic worth exploring further in conjunction with S. 1434, and in that connection I believe attention should be given to Judge Choy's remarks on this subject in the recent International Association of Machinists v. OPEC case,27/ as well as the conflicting opinions in the Dunhill decision.28/

23/ 376 U.S. at 431-32.

24/ See Letter from Jack Tate, Acting Legal Adviser to the Department of Justice, May 19, 1952, reprinted at 26 Dept. of State Bull. 984 (1952).

25/ 28 U.S.C. §§1602-1611.

26/ See Letter from Monroe Leigh, Legal Adviser, to the Solicitor General, November 26, 1975, reprinted at 425 U.S. 706 (1976).

27/ 649 F.2d at 1357-60.

28/ Compare 425 U.S. at 695-706 (White, J., Burger, C.J., & Powell, Rehnquist, J.J.) with 425 U.S. at 724-28 (Marshall, Brennan, Stewart & Blackmun, J.J.).

When the courts refuse to decide issues of international law properly presented to them, they forego the opportunity to apply international law where it provides an appropriate basis for decision.29/ They may also fail to do justice to the parties before them. And, significantly from our perspective, their refusal to pass on questions of foreign governmental conduct may actually frustrate important foreign policy objectives. The State Department has previously expressed this latter concern in the series of cases growing out of Libyan expropriations of oil concessions when several courts applied the act of state doctrine to bar adjudication of the expropriations.30/

At the same time, however, I think it is only prudent to proceed cautiously when considering as sweeping a proposal as S. 1434 to limit the act of state doctrine. There is little doubt that in many cases embarrassment or interference in the conduct of foreign affairs would not result if U.S. courts were to review the validity of foreign acts of state under international law. But I am personally concerned that there may remain cases where judicial abstention would be appropriate on foreign policy grounds. One possible example is when the Executive branch has adopted a position of neutrality toward an international dispute, for instance when there are competing claims over particular territory.31/ If the courts were compelled to pass on the validity of either or both of the claims in the context of a private lawsuit, their action could vitiate the Executive's foreign policy decision to refrain from commenting on the merits of the dispute.

Another possible example is when the political branches have determined that diplomatic negotiations afford the best opportunity for achieving satisfaction of the interests of a group of American citizens. To preclude the courts absolutely

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29/ Cf. The Paquete Habana, 175 U.S. 677, 700 (1900).

30/ "Statement by the Department of State on Policy on 'Hot' Libyan Oil," 13 Int'l L. Materials 767 (1974). See Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322 (Tex.), cert. denied, 444 U.S. 992 (1979).

31/ Cf. Occidental of Umm al Qaywayn v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978). Occidental Petroleum v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950 (1972).

from abstaining on act of state grounds in the scattered, individual cases that might be brought -- despite the decision to proceed diplomatically -- could jeopardize the entire settlement process.

Perhaps in cases like these, other doctrines of abstention -- such as the political question doctrine -- might remain available to the courts under S. 1434. Because of the uncertainty concerning the relationship of the act of state to the political question doctrine, however, S. 1434 could be interpreted to affect the application of both doctrines in a particular case.32/ Attempting to modify the political question doctrine might provoke a confrontation with the judiciary, which has its own interests to protect in rejecting non-justiciable cases.

As members of this committee are aware, the Sabbatino Amendment, as presently written, permits the courts to abstain in cases where "the President determines that application of the act of state doctrine is required ... by the foreign policy interests of the United States ...."33/ I would suggest that if the committee favors a general limitation of the act of state doctrine as in S. 1434, further consideration should be given to including a provision granting similar flexibility in order to ensure that the courts and the executive are not precluded from accommodating the significant foreign policy interests that might be affected in a particular case.

Before closing my remarks, I would like to point out a few technical concerns I have with S. 1434.

Section 3 of the bill would remove the act of state doctrine only in cases where "the act is contrary to international law." This formulation might be interpreted to require the courts to apply the act of state doctrine where a foreign state has acted consistently with international law. I doubt this was the intent of this section.

The next provision of the bill, section 4(a), refers to acts by Congress to "refine [ ]" international law. I find this formulation troubling. While Acts of Congress are of course controlling in U.S. courts pursuant to Article VI of

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32/ Compare Sabbatino, supra, 376 U.S. at 423, 427-30, 433 (act of state) with Baker v. Carr, 369 U.S. 186, (1961) (political question). See Dunhill, supra, 425 U.S. at 715, 727 (Marshall, J., dissenting).

33/ 22 U.S.C. § 2370(e)(2)(1976).

the Constitution, they do not automatically "refine" the international law of the community of nations, but rather provide guidance and direction to the courts in applying international law domestically. It would be more appropriate, I think, to refer to Congress' role in articulating or defining international law for the courts.34/

The need for section 4(b) -- directing the courts to "apply principles and rules of international law" in certain cases -- is not readily apparent. There is a large body of choice of law principles developed by the courts to determine appropriate rules of decision in cases involving more than one jurisdiction.35/ Section 4(b), on the other hand, could be read to mandate reliance by the courts on international principles even where they are inappropriate under these choice of law principles, or entirely lacking. Additionally, the provision's application only to cases involving persons who are not nationals of the state in question might erroneously suggest that international law is never relevant to a government's treatment of its own national.36/

In closing, again I would like to thank the committee for affording me the opportunity to appear today, and I look forward to continued, close cooperation in the examination of topics of mutual concern. I would be happy to address any questions you may have. Thank you.

34/ *See* U.S. Const. art I, §8, cl. 10.

35/ *See generally* *Restatement (Second) Law of Conflicts* § 6 (1969).

36/ *See*, *e.g.*, Filartiga v. Pena-Irala, *supra*, 630 F.2d at 884.

Senator MATHIAS. Our second witness is Professor Wallace, the director of the International Law Institute at Georgetown Law Center.

Professor Wallace.

STATEMENT OF DON WALLACE, JR., PROFESSOR OF LAW AND DIRECTOR OF THE INTERNATIONAL LAW INSTITUTE, GEORGETOWN UNIVERSITY LAW CENTER

Mr. WALLACE. Mr. Chairman, it is a great pleasure to be appearing before you again.

I have some prepared remarks, but with your indulgence, I will not read them, but rather——

Senator MATHIAS. They will all be included in the record.

Mr. WALLACE. Thank you. I will try to elaborate on them.

It is a pleasure to be here to support S. 1434, the International Rule of Law Act. As you have stated on many occasions, the enactment of such a law would enhance the capacity of the United States and its courts to contribute to international law. I think that is a real plus.

You yourself have said and written that the act of state is outmoded and it is confused. It is not only confused in its content, but as a good deal of writing and speaking on the subject suggests, it is confused in its origins. It is not clear whether it comes from international law, conflicts of law, or the separation of power.

The bottom line is that this confused and outmoded doctrine frustrates the normal operation of the courts, as you said in your opening remarks, and produces injustice in individual cases.

The proponents of the doctrine, although it is admittedly 80 or 90 years old in American usage, have a burden of proof, and I think they have got to meet it, especially—and I might return to this again—because almost no other country has the doctrine. The truth of the matter is that other countries can handle the situation extremely well that our act of state doctrine seeks to handle, and it has done it by creating an incredible sprawl of litigation. And I think it is perfectly safe for us to follow these other countries. I will return to that.

One person has asked me, is it appropriate for the Congress by legislation to eliminate a judicial growth? Should that not be for the courts? But I think this is an area where the courts should be saved from themselves. They seem to be unable to prune this particular growth.

Now, the Justice Department in its testimony, which I just had occasion to glance at an hour or so ago, said that if we let the courts go, they will go wild in creating international law. I might return to that. I think it is clear that the courts have been somewhat undisciplined in the development of the act of state doctrine.

Mr. Robinson, the legal adviser, said that one should proceed with caution. I think one always should. And I think that is the purpose of these hearings, as you suggested.

I myself am prepared to suggest that one could be a little less cautious, however, and indeed, that one could safely abolish the act of state doctrine in its entirety. As I have said, almost no other country has it.

Just for a moment we might review what it is the act of state doctrine does. You yourself have written and spoken to this. For the record, it prevents the United States from applying international law—and I do not accept the position of the Justice Department that we cannot trust our judges to develop international law. And indeed, I do not believe it is appropriate for the Justice Department to be the source of international law. There is some suggestion in their remarks that this bill would interfere with the capacity of the executive to contribute to the elaboration of law. We have seen something like that in the recent Iranian litigation, and I think it is highly mischievous that the executive should be a source of international law. The executive is to execute the laws, to enforce them, not to create them. Possibly the Congress can define the laws, but not the executive.

The act of state doctrine prevents the application of international law. The act of state doctrine prevents the application of American law. In most countries you have a normal, private international law conflicts of law approach. The foreign country's laws would be applied, such as the Cuban expropriation decrees, but then the local court says no. Under our local, domestic, municipal law, the conflicts of law, we have a public policy or we have a rule that we will not apply a foreign confiscatory law. And they do not apply it. The act of state doctrine prevents us from applying our own conflicts of law.

It prevents us, as is suggested in your opening remarks, from applying foreign law, that is, if the Constitution of Cuba declared that those Sabbatino expropriation decrees were unconstitutional—and there was some suggestion, incidentally, that initially they had not been officially and properly published in the official gazette in Cuba—we cannot look to see whether they violate foreign law. So it is more than a doctrine of abstention. It is a doctrine really of abdication, as you have suggested.

Now, I do not want to get into a learned discussion as to the origins of the doctrine though that could be relevant in terms of rebutting some of the arguments. It has been suggested that it lies in the separation powers, and that must be part of the explanation.

My own feeling is that it is an encrustation, on the conflicts of law, of our full faith and credit clause, which may be appropriate in the domestic setting, but I think has almost nothing to do with the international setting.

The practical issue that has to be addressed finally, or penultimately, is would it be safe to abolish or severely limit the act of state doctrine? I feel certainly to a professorial, but also to a moral certainty, which is probably rarer, that it would be safe. We have the safety nets that are needed. Almost every other country in the world has found them, and we are not that unique. We have the normal approach of conflicts of law. We have the foreign sovereign compulsion doctrine. The Justice Department criticizes the bill because it seems to freeze that doctrine. I think they should be rather grateful that it has even been mentioned. It has never been fully enshrined. It is emerging. If there should be some flexibility in the drafting, that could be done.

We have the political question doctrine that Mr. Robinson referred to, and I think his points were very thoughtful. I agree with him: The line between the political question doctrine and the act of state doctrine is not clear. But if you eliminate the act of state doctrine or remove it in this area, you will clear away the tangle, and the courts will develop not only international law, they will have to think about the political question doctrine, which probably is a cousin of the act of state doctrine. But that should not be a problem. The courts are mucking up the act of state all the time. Maybe they will have to play around a little bit with the political question doctrine. But I am not that worried about U.S. judges.

As far as OPEC goes, the case that Mr. Robinson mentioned, of course Judge Choy himself cited five or six other grounds on which the case might have gone, including the two that the lower court took. And my own feeling is that one could easily survive any attempt to sue OPEC and have the case dismissed, as I suppose any right-minded person or many would think should be the case, without the act of state doctrine, and as other courts have done.

Finally, to get to the Justice Department point of view that if you clear away the act of state doctrine and leave the courts to define international law—which incidentally is why judges are presumably appointed for life, to develop law—I do not think that is something that the Justice Department should be so afraid of, the development of substantive law by judges, argued by lawyers in actual cases. There will be limits to international law, as Mr. Robinson has pointed out, as the Justice Department points out. The courts are not going to say everything violates international law. If anything, it will be a nice, bracing discipline for the judges. They will have to face up to the fact that they cannot indulge in vague dicta about international law, that they have got to meet the bottom line, they have got to decide the case, and as the *Sabbatino* decision itself suggested, there are tremendous limits to international law. And many cases will be brought against foreign governments which will be dismissed. And that is the way our judicial system works: Cases are brought, people are slightly embarrassed, and hopefully in most cases we get the right result, and we should not worry about an occasional bit of verbiage.

One of the later witnesses I think will suggest that we should codify the act of state doctrine rather than limit it or abolish it. We have seen a tremendous sprawl in this area, and my own feeling is that codification will never catch up with it for some of the reasons that Mr. Robinson suggested, the difficulty of the political question doctrine, the difficulty of foreign sovereign compulsion, and that your instinct, Mr. Chairman, and that of the committee to sweep away or severely limit the act of state doctrine is the better approach.

If the banks have a problem, that can be solved in the way that the problem was solved at the time of the Sabbatino amendment, maybe put somewhere in some banking legislation so it will not get the judges going on act of state in all other areas.

The State Department in the past, before the incumbency of the present legal advisor, has, on more than one occasion, said it could live with the abolition of the act of state doctrine, indeed has so said in a submission to the Supreme Court, but has also said in submissions to other courts.

Finally, I would like to say just this. This is a reasonably technical area. It is difficult for courts to deal with technical areas. It is occasionally difficult for the Congress to deal with technical areas. I feel sincerely that you and the committee are to be commended for taking on something like this and risking the wrath of a gaggle of law professors falling on your head, and various litigants and their lawyers, and I think your writings and statements are correct, and that the name you give to this bill is a good one, the International Rule of Law Act. If we were to push the act of state doctrine to one side, the courts, American judges would have to define law. I think that is what judges are appointed to do. And I do not think we should be ashamed of American judges. I think one of the rationales, if one can fully understand the rationales of the *Sabbatino* decision, was a feeling by Justice Harlan that people around the world feel that American judges on the Supreme Court would be biased, in that case of capital exports, and therefore any law that we develop would be suspect.

I just do not think we can live on that basis. I do agree with what Mr. Robinson said, that we are a little bit expansive in applying our municipal law. Here we are talking about international law. This is a country which is known for its adhesion to international law. It seems to me that our courts must contribute to the development of substantive international law, and that we have no need to be ashamed, and that our Supreme Court Justices and our other judges will be every bit as dispassionate as the judges on the International Court of Justice who very rarely decide cases.

And the consequence of not doing this is that law continues to be stultified and does not develop.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you very much, Professor Wallace.

Why is it, do you suppose, that the antitrust bar——

Mr. WALLACE. Is bothered?

Senator MATHIAS. Is bothered. It is less than enthusiastic.

Mr. WALLACE. Well, of course, some of their clients have ambiguous interest. If it is a large American company whose property has been expropriated or whose contract has been repudiated, as in Iran, they should of course want the abolition of the act of state doctrine, as they will want it if the Iranian cases come back from the Hague to our Federal district courts.

On the antitrust side, I think they are often involved as defendants in alleged conspiracies in violation of our antitrust laws, and if I were their lawyer, I would want as many defenses as possible.

Now, I personally feel that they are being somewhat greedy, and I believe that they have the foreign sovereign compulsion defense, and that is the key. If they have been compelled by a foreign government, then they should be immunized from antitrust violation. If they have been less than compelled, if they have—and this is the extreme case—procured the involvement of the foreign government, then there is no reason in law or ethics why they should be immunized.

Now, the act of state doctrine makes it difficult to investigate to determine whether there has been compulsion or not. You get the court in *Maracaibo,* for example, saying we more or less believe that the defendants have been compelled—and my guess is they were, incidentally, in that case—but in any event, we cannot look at it because of the act of state doctrine.

I think doctrinally—that is a bad word; it reveals a professorial bias which one always has to fight—they are very separate, the act of state doctrine and foreign sovereign compulsion. My own feeling is that at its roots foreign sovereign compulsion comes from and is probably an extension of due process, that you should not be squeezed between two governments.

Act of state is just relative flotsam compared to that, coming from the English history you mentioned, kept long beyond its time, and very complicated. Therefore it scares lawyers to get into it. I think foreign sovereign compulsion would do the job quite well, I would think, in the antitrust field; without further study, I would tell you my instinct.

Senator **Mathias**. Is this frequently the recourse in foreign countries which do not recognize the act of state doctrine?

Mr. **Wallace**. I have to confess I do not know, because I think foreign sovereign compulsion comes from our due process notions. Incidentally, it was mentioned in a nonantitrust area by the Supreme Court in *Société General* in connection with due process. My own guess is that most foreign countries do not have it because they do not have our due process jurisprudence, and possible use notions of duress and other such doctrines.

Senator **Mathias**. Well, now, you and I think passage of this bill might make a difference, but I suppose the acid test of that is whether the world would have been different, let's say, in some of the recent cases had this bill been enacted earlier.

Can you think of any recent cases in which the abolition of the doctrine would have made a real difference?

Mr. **Wallace**. Well, I think in the Iranian litigation now pending in the courts, although suspended awaiting determinations by the Iran-American Claims Tribunal, which are very much like the *Sabbatino* case, the Cuban expropriation cases with which Mr. Rabinowitz is very familiar, I think the absence of the act of state doctrine would be very relevant.

Second, in a case that came in out of the blue, in an arbitration case involving the Libyan oil expropriation, the court would not enforce a foreign arbitral award because of the act of state doctrine, and I dare say that troubled many of the lawyers who might argue the act of state doctrine in the antitrust field.

Third, you yourself have written about the *Filartiga* case. The State Department, as amicus to the court, urged the court to take on *Filartiga,* urged them to develop international law. Now, my own guess is *Filartiga* would run into act of state problems.

In the *Sabbatino* case the unhappy litigants had to come to Congress to get a law passed. It was almost a single-case law as it turned out.

So I do think there would be differences, in the expropriation area, and repudiations of contracts that can come up in Iran, depending on what happens in the Hague, and in the human rights area, as in *Filartiga.* In the antitrust field, my own feeling is it will not make a difference, that where there has been compulsion, there will be compulsion, and where there has been the procurement of conspiracy by the companies, well, that is life. I mean, if you do something which violates our antitrust laws, why should you not suffer the consequences even though it is inconvenient?

That is my own feeling, Mr. Chairman.

NO CONSTITUTIONAL PROBLEM

Senator **Mathias**. Well, one final question.

Do you see any constitutional obstacle to the bill?

Mr. **Wallace**. I am not a constitutionalist, so I speak with probably excessive confidence when I say no. The courts have not seen any problem. They have upheld the *Sabbatino* amendment, so-called, saying there was no constitutional problem. In *Sabbatino,* Mr. Justice Harlan used the phrase "constitutional underpinnings." I think it is reasonably certain he did not mean that the act of state doctrine was constitutionally compelled. And as I have said, the State Department has said that if the Supreme Court were to abolish it or if it were otherwise abolished, they could live without it happily, and I dare say they would not have said that about something they thought was unconstitutional.

So my own feeling is no, the legislation with respect to foreign sovereign immunities withstood the test; the prior legislation with respect to this subject has stood the test. I think the track record in this area suggests there would be no constitutional objection.

Senator **Mathias**. Well, thank you very much, Professor Wallace.

Mr. **Wallace**. Thank you, sir.

Senator **Mathias**. I appreciate your continued interest.

[The prepared statement of Mr. Wallace follows:]

PREPARED STATEMENT OF DON WALLACE, JR.

I am very pleased to appear before this subcommittee of the Senate Judiciary Committee to testify in support of S.1434, the International Rule of Law Act.

As I have previously stated, I believe that the enactment of a bill such as this would enhance the capacity of the courts of the United States to contribute to the progressive and sound development of international law, which many think a very important cause.

Indeed, I would be prepared to support a bill that abolished the act of state doctrine in its entirety.

As Sen. Mathias has suggested in his floor statement introducing this bill, it is ironic that whereas our courts are often accused of extravagance in their "extraterritorial" application of our antitrust and other laws a subject to be studied pursuant to S.432 if enacted into law, in this area our courts seem to "shirk" a judicial responsibility.

1. As you have noted, Sen. Mathias, the act of state doctrine is in some respects a confused doctrine, and I do not believe that an exhaustive scholarly survey of it would serve a useful purpose. In brief, the classic and often quoted formulation of this American rule is that of the Supreme Court in Underhill v. Hernandez, 168 U.S. 250 (1897) at p. 252:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

With the legislative codification of the doctrine of foreign sovereign immunity, and one hopes its practical elimination at least in the commercial area, we can expect more pressure on the act of state doctrine as foreign governments and other defendants seek to use it in our courts.

2. Not only is the doctrine somewhat confused; its origins are too. It seems reasonably clear that its origins are not in international law; as you have pointed out, the doctrine is largely unique to the United States. The Supreme Court in the case of Banco Nacional de Cuba v. Sabbatino, suggested that it has constitutional underpinnings. My own hunch is that another source of the doctrine is the full faith and credit clause idea, from the interstate context, which has been encrusted on to principles of international conflicts of law. In any event, I do not believe that there is any constitutional obstacle to legislation with respect to the doctrine, as would seem to be borne out by the fact that the courts have upheld section 620(e)(2) of the Foreign Assistance Act of 1961, the so-called Sabbatino Amendment (which this bill would repeal).

3. S.1434 should have considerable practical application. We have recently seen the Surpreme Court in Dames & Moore v. Regan "suspend" a large number of Iranian claim cases in the U.S. courts, pending the deliberations of the Iran-United States Claims Tribunal in The Hague. Some of these cases will be reviewed in our course and, while it is problematic at this time what the courts can do with them, the removal of the bar of the act of state doctrine in those cases where it is involved may be essential to any affirmative outcome.

4. I suggested before that I would support the abolition of the act of state doctrine in its entirety and I believe it could be safely done. I believe that our judicial system could cope with the problems that the act of state doctrine seeks to address--as do other legal systems without the benefit of the doctrine--and at the same time decide cases which it now refuses to do.

This would be possible for a number of reasons. The emerging defense of foreign sovereign compulsion would remain, as the bill makes clear. The political question doctrine would remain available to the courts--this being a "constitutional underpinnning" on which the act of state doctrine probably in part stands. General deference of our courts to the Executive and Congress in foreign affairs could continue to be expected. The supremacy clause of the Constitution under which treaties, executive agreements, and other laws are the supreme law of the land would remain untouched. Defenses of standing, general nonjusticiability, and forum non conveniens would remain.

And there are other defenses that remain to defendants. As you will know, the U.S. Court of Appeals in the Ninth Circuit recently relied on the act of state doctrine in affirming the dismissal of the OPEC case. If the act of state doctrine were abolished or limited as S.1434 proposes, could OPEC be successfully sued? Pretty certainly not. As the court itself said in its conclusion, "We need not reach the issues regarding the indirect-purchaser rule, the extraterritorial application of the Sherman Act, the definition of 'person' under the Sherman Act and the propriety of injunctive relief." Beyond that, there is the substance of international law itself. It does not proscribe cartels, as the court points out, and therefore as a substantive matter, the offenses charged to OPEC would probably remain untouched.

5. I applaud the general purport of section 4 of the bill, which provides that the courts and not the Congress, will determine the content of international law. This of course is one of the purposes of the "international rule of law act." I believe all will be served if our courts--which are probably among the most independent, vigorous and most frequently served by able counsel in the world--are able to contribute to the

meaningful development of substantive international law in the area of expropriation of property, repudiation of contracts, infringement of personal rights, and other areas.

6. In a rather technical area of the law, I think the bill proposes a major step forward. I think the sponsors of the bill, this Committee, and the Congress and the President if they enact the bill, stand to be very much commended by the bar and its clients.

Thank you very much. I will be very happy to answer any questions that I can.

Senator MATHIAS. Our next witness is Carolyn Kuhl, the Special Assistant to the Attorney General.

STATEMENT OF CAROLYN B. KUHL, ESQ., SPECIAL ASSISTANT TO THE ATTORNEY GENERAL OF THE UNITED STATES

Miss KUHL. Good afternoon, Mr. Chairman.

I am pleased to be here today to give the committee the views of the Justice Department on S. 1434, which would eliminate the bar of the act of state doctrine to adjudication of certain cases in U.S. courts. Because one of the primary reasons for the act of state doctrine, as articulated by the courts which crafted that doctrine, is to avoid interference by the courts in the executive branch's conduct of foreign affairs, this bill may have significant implications for our foreign relations. The State Department has greater expertise in that area, and the Justice Department defers to the State Department in its assessment of those implications.

I will primarily address the effect of S. 1434 on the development and enforcement of the law, especially international law, although to some extent——

Senator MATHIAS. Excuse me. I see some of the witnesses are straining to hear you. Perhaps if you would pull the microphone a little closer to you, they could hear you better. There seems to be a trip hammer going somewhere in the background which is not helping.

Miss KUHL. I will primarily address the effect of S. 1434 on the development and enforcement of the law, especially international law, although to some extent these considerations lap over into the foreign relations area.

With your permission, in light of the comments of previous witnesses, I would like to summarize portions of my prepared statement and perhaps cover some of the points raised or questions raised by Professor Wallace with regard to our testimony.

I think it is useful, however, before discussing the implications of S. 1434, to outline the scope of what the bill purports to do. The act of state doctrine is closely intertwined with other jurisprudential doctrines and principles and has often been analytically confused with other defenses sometimes raised in cases involving foreign conduct such as sovereign immunity and the foreign sovereign compulsion defense.

The clearest way to describe the scope of S. 1434 is to outline what the bill will not affect. The proposed bill does not affect the immunity of a foreign sovereign to suit in U.S. courts. The Foreign Sovereign Immunities Act of 1976 sets forth the circumstances under which a foreign sovereign can be sued in a U.S. court, and acts as a long arm statute by which in personam jurisdiction can be obtained over a foreign sovereign. The Foreign Sovereign Immunities Act presents a threshold requirement for suits against a foreign sovereign. Thus, although S. 1434 might allow adjudication of a particular question on the merits, the foreign sovereign cannot be subjected to the claim unless the minimum contact requirement represented by the Foreign Sovereign Immunities Act is first met.

S. 1434 explicitly does not modify the defense of foreign sovereign compulsion. It also apparently would not restrict other means of judicial deference such as the political question doctrine, and dismissal on grounds of forum non conveniens.

Although the bill states that it shall not be deemed to modify the foreign sovereign compulsion defense, it is possible that this language may be interpreted to freeze that defense in its present form. This would be an unfortunate result since at present there is no clear consensus among the courts and commentators as to the proper application of the foreign sovereign compulsion defense. The bill should be clarified to emphasize that it does not intend to thwart further development and refinement of that defense and other doctrines relating to foreign conduct.

The proposed legislation also does not affect the application of municipal law of the United States to acts of foreign sovereigns absent applicable principles of international law. Thus, the legislation would not resolve the difficult questions raised in some recent antitrust cases concerning the "extraterritorial" application of the U.S. antitrust laws to foreign countries' arguably commercial activities, issues such as troubled the ninth circuit in the *International Association of Machinists* v. *OPEC* case.

Similarly, the bill would not affect the act of state doctrine insofar as it prevents U.S. courts from determining the validity of an act of a foreign sovereign under that sovereign's own laws.

Another area of uncertainty left unresolved by the bill is the refusal by some courts to examine the circumstances leading to a foreign sovereign's act if that act was the immediate cause of the plaintiff's injury. This situation occurs most commonly in antitrust cases where defendant firms are alleged to have induced a foreign government to deprive a competitor of various kinds of commercial rights in the foreign country.

The scope of the proposed legislation therefore is limited to modifying the act of state doctrine to permit courts to analyze the legality under international law of the conduct of a foreign sovereign, either in litigation against the foreign sovereign when the Foreign Sovereign Immunities Act allows jurisdiction, or in cases against a private individual where the validity of an act of a foreign state is at issue.

The remarks made when this bill was introduced, and the scope of the bill itself, indicate that the goal of the legislation is essentially twofold: first, to give individual plaintiffs a forum for remedying wrongs against them by foreign sovereigns, especially in instances of expropriation or egregious violations of human rights; second, to encourage the development of international law, and concurrently, to discourage violations of international law.

S. 1434 actually may provide redress for litigants in very few cases because the courts heretofore have tended not to find a clear body of international law. On the other hand, if the courts view this legislation as an invitation to interpret international law more expansively, there are a number of potential risks that the Justice Department believes should be evaluated.

Legislation which is interpreted by the courts to mandate aggressive development of international law, and application of that law to the conduct of a foreign sovereign may have an adverse effect on our foreign relations in light of the present perception by some nations that the United States has been taking too broad a view of the extraterritorial application of its municipal laws.

In addition, an expansive definition of international law by the courts could create a new body of law to be applied in purely domestic litigation and may pose new problems of interference with the executive in the area of foreign affairs.

I will discuss the possible implications of the expansion of international law under S. 1434 in greater detail in a few moments. First I will describe the courts' present, more restrictive view.

The U.S. courts have tended to give a very restrictive interpretation to international law. The Supreme Court in *Sabbatino* indicated that the question of limitations on a state's power to expropriate the property of aliens is an unsettled question in the realm of international law. Similarly, the Hickenlooper amendment, which already provides for application of international law in expropriation situations, has been interpreted very narrowly by the courts. Several courts, for example, have refused to adjudicate cases involving the Libyan expropriation of American companies' oil properties, and one has done so on the ground that international law concerning adequate compensation in cases of expropriation is unclear.

Indeed, the only case in which the Hickenlooper amendment has been applied to permit adjudication in an instance of expropriation was on remand in the *Sabbatino* case itself. The courts' views of the existence and uncertainty of international law principles would not necessarily change dramatically as a result of S. 1434.

Thus, even though S. 1434 permits courts to apply international law to the conduct of foreign sovereigns, they might do so in few cases because of perceived uncertainties in the substance of international law. If, however, enactment of S. 1434 were interpreted by the courts as a mandate for greater judicial activism in defining and applying international law, a number of other issues are raised.

An expansive interpretation of international law, coupled with an exception to the act of state doctrine allowing that law to be applied in the courts of the United States, may aggravate an already existing problem regarding foreign nations' resentment of what is perceived as the extraterritorial application of U.S. municipal law to international business transactions.

S. 1434 would not deal with the problem of what has been called the extraterritorial application of U.S. laws to international business transactions. The Justice Department agrees that the present bill is not an appropriate vehicle for resolution of these problems and anticipates that they may best be dealt with by way of bilateral agreements with our major trading partners to define the circumstances in which each country's law would be applied. However, insofar as S. 1434 is viewed in the international community as an invitation for the U.S. courts to aggressively develop unsettled areas of international law, and to apply that law to activities of other sovereign states, this legislation may be viewed as another manifestation of what many foreign nations feel is a tendency by the United States to act as an international policeman, especially in commercial activities.

An additional concern raised by the potential for an expansive or aggressive development of international law is that the law may have a restrictive effect on our domestic affairs. There may be some occasions in which the courts are presented with evidence of international custom which goes beyond what is required by our own laws. For example, very recently a federal district court in Kansas held that certain aliens who were in this country illegally were being detained in custody in violation of their human rights, not as those rights are defined by the laws of this country, but as defined by international law.

Thus, S. 1434 must be examined with a view toward not only the consequences of applying international law developed by the courts to foreign states, but also the consequences of applying such law in purely domestic litigation, including litigation against the United States. Moreover, if the courts develop standards of international law in areas which previously were thought to be unsettled, the practical effect may be that the executive will have to adhere to that interpretation of international law in its dealings with foreign countries.

May I summarize one final point, Senator?

Senator MATHIAS. Please do.

Miss KUHL. Thank you.

This leads me to my final point. The act of state doctrine has been said by the courts who have created it to have constitutional underpinnings. Although the Supreme Court has stated that the doctrine is not constitutionally required, it has articulated a basis for the doctrine in the principle of separation of powers. Courts have been extremely reluctant to involve themselves in passing judgment on the activities of foreign sovereigns even when the activities have effects in the United States and are alleged to be in violation of the municipal laws of the United States. Because courts have injected themselves in this area so seldom, there are perhaps few examples of the dangers of courts 'interference in that realm. However, if the courts begin to involve themselves in the articulation and definition of a new body of law in the international realm, there may be a new risk of interference with the executive functions in the area of foreign affairs.

Thus, the Justice Department cannot support S. 1434 in its present form. While the bill would seem to affect the outcome of few cases if the courts' present restrictive view of international law continues, the bill may invite expansion of international law. Because of risks and uncertainties posed by the creation and enforcement of a new body of international law without the involvement of the executive branch, the potential gain does not seem to justify the potential risk.

The Department does believe that this bill is representative of a whole area that is worthy of further study, and, as I have noted, there are a number of areas of uncertainty related to the act of state doctrine. It may in fact be fruitful to study in greater detail the ways in which other countries with court systems similar to our own have dealt with such problems, and the Department supports this committee's inquiry in this area.

Thank you for this opportunity to make the views of the Department known to the committee, and I would be happy to address your questions at this time, Senator.

Senator MATHIAS. Well, I appreciate your testimony very much, but it leaves me feeling a little like the old comedians' line, we feel for you, but we can not quite reach you. You have an open mind, but you have not really endorsed the bill, nor have you totally stated opposition to it.

So I am wondering since you have given the bill careful thought, whether you have any suggestions for us as to amendments or changes which you think would make it more acceptable to the Department?

Miss KUHL. Well, I think that one area of our concern has been, in reviewing this bill, the open-endedness of the definition of international law. I think I might say in response to Professor Wallace, it is not that we believe that we cannot trust the courts; it is that we feel if the courts continue to take a restrictive view of international law, as they have, the bill really will be to very little effect in redressing the rights of litigants.

Senator MATHIAS. But what about the other side of that question, that international law is, in fact, being applied by other courts in other countries representing millions of human beings on the face of the Earth and representing very substantial economies, so that if we don't participate we are, in fact, abdicating our role in the development of international law?

Miss KUHL. The United States does participate to the extent that the executive becomes involved in treaties, multilateral conventions, and declarations of the U.N. which define international custom. I think these are referred to in the Article of the International Court of Justice Statute to which you refer in your bill, and to that extent the United States is participating.

Senator MATHIAS. Of course, I do not want to be argumentative about it, but I would suggest that perhaps there is wisdom beyond the executive branch.

Miss KUHL. Well, I think, Senator, we heard quite a bit about judicial restraint in the confirmation hearings of Judge O'Connor last week.

Senator MATHIAS. Not from me, you did not. [General laughter.]

Miss KUHL. That is correct, but from others, and I think if we are asking the courts to develop the law in this area, we are posing for them a fairly uncertain task and a very burdensome one. The Department has some concern about the effect on expanding the scope of litigation, to have litigants raising international law principles in uncertain areas in addition to raising, say, domestic law, and thereby creating an additional uncertainty and complexity in litigation which may impair settlement and efficacious resolution of the litigation.

We also are placing a very heavy burden on the courts, on the district court sitting in an outlying area, somewhat remote from good libraries and that type of thing, sources of discussion of international law principles or conventions and treaties.

Senator MATHIAS. Well, now, that gives me the opportunity to plug for the Department's support for making the resources of the National Law Library, which is a component of the Library of Congress, available all around the country, as the National Medical Library is now available to medical schools and research centers all around the country. By having computer facilities available you can very easily do that so that judges and lawyers and everyone can plug right in to the remarkable international law facilities that we have here at the Library of Congress.

So let me give you that as an associated project for this.

Miss KUHL. Thank you, Senator. I'm not aware of that proposal, but I——

Senator MATHIAS. You say you are aware?

Miss KUHL. I said I am not aware of that proposal myself, although it may be under consideration at this time in the Department.

Senator MATHIAS. Former Senator Robert Griffin of Michigan has been very active in that effort, and the American Bar Association has been very active in it. So I hope that you will be an advocate within the Department so that we can persuade the Librarian of Congress to include those facilities in one of his early budgets.

Miss KUHL. I will certainly look into the matter, Senator, although I do not think that even the availability of an extended library would solve the problems for the courts in trying to wade through the material.

Senator MATHIAS. Well, I do not know that we could get much further on this, but I must say that I would feel no less unhappy about the development of international law because some American judges were participating in the process than I do when as far as the case law is concerned, the matter is now in the hands of German judges, Swiss judges, French judges, Nigerian judges, Venezuelan judges. I do not have such a high regard for their activities that I think they have any exclusive right to make case law, and I think American judges might do just as well.

Miss KUHL. Well, once again, I think that there is area for study here in determining how other courts decide, particularly because some of their conflict-of-law rules and sovereign immunity rules may prove fairly restrictive as to the types of cases they are deciding.

Senator MATHIAS. Well, we would be glad to have any further information you can give us on that during the period in which the record will be open.

Miss KUHL. Thank you, Senator.

Senator MATHIAS. Thank you very much.

[The prepared statement of Miss Kuhl follows:]

PREPARED STATEMENT OF CAROLYN B. KUHL

I am pleased to be here today to give the Committee the views of the Justice Department on S. 1434, which would eliminate the bar of the act of state doctrine to adjudication of certain cases in United States courts. Because one of the primary reasons for the act of state doctrine, as articulated by the courts which crafted that doctrine, is to avoid interference by the courts in the executive branch's conduct of foreign affairs, this bill may have significant implications for our foreign relations. The State Department has greater expertise in that area, and the Justice Department defers to the State Department in its assessment of those implications. I will primarily address the effect of S. 1434 on the development and enforcement of the law, especially international law, although to some extent these considerations lap over into the foreign relations area.

THE BILL

The purpose of S. 1434, as articulated in its "Findings and Declaration of Purpose," is to eliminate the act of state doctrine insofar as that judicial doctrine bars courts from application of international law. The bill would add to Title 28 a provision requiring that courts shall not decline on the ground of the act of state doctrine to determine a case on the merits when "the act of state is contrary to international law." Section 4(b) of the bill states that courts should apply the principles and rules of international law in any case involving a violation of that law by a foreign state "with respect to the personal, property, or contractual rights of a person not a national of that state. . . ."

S. 1434 defines the international law to be applied as that referred to in Article 38 of the Statute of the International Court of Justice. That Article, which is part of the multilateral treaty creating the International Court of Justice, describes four sources of international law: first, international conventions establishing rules expressly recognized by the contesting states; second, international custom as evidence of a general practice accepted as law; third, general principles of law recognized by civilized nations; and, fourth, judicial decisions and the teachings of highly qualified publicists as a means of determining the rules of law to be applied. The bill also states in Section 4(a), that the international law to be applied to United States courts, administrative bodies, and executive officers may be refined by any Act of Congress adopted to clarify principles of international law.

The bill explicitly leaves in place the foreign sovereign compulsion defense, which it finds to be conceptually distinct from the act of state doctrine. It also would repeal 22 U.S.C. § 2370(e)(2), the so-called "Hickenlooper" or "Sabbatino" amendment.

THE ACT OF STATE DOCTRINE

The origins of the act of state doctrine may be traced to the time of Chief Justice John Marshall. In The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall stated that questions arising out of the wrongs of foreign sovereigns "are rather questions of policy than of law, [and] are for diplomatic, rather than legal discussion. . . ." 11 U.S. at 146. The classic formulation of the act of state doctrine is the statement in Underhill v. Hernandez, 168 U.S. 250, 252 (1897), that:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The development of the doctrine has been less than consistent. The Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), weighed the importance of the foreign relations implications of the matter at issue before determining whether it was necessary to give the political branches exclusive authority over its resolution. Dunhill v. Republic of Cuba, 425 U.S. 682 (1976), has been interpreted by some courts and commentators as creating an exception to the act of state doctrine when the commercial activity of a foreign sovereign is at issue. Another variation of the doctrine, which was never accepted by a majority of the Supreme Court, is the so-called Bernstein exception which holds that the act of state doctrine does not apply in cases where the executive branch has clearly indicated that it has no objection to the court's determining the case on the merits.

The "Hickenlooper" or "Sabbatino" amendment created a statutory exception to the act of state doctrine in instances where the act of state is in the nature of a confiscation in violation of the principles of international law. 22 U.S.C. § 2370(e)(2). This statute was intended to overrule the Supreme Court's decision in Sabbatino which refused on the ground of the act of state doctrine to adjudicate the claim of one whose property was expropriated by the Cuban government. The Hickenlooper amendment does away with the act of state doctrine only where the violation of international law is in the nature of an expropriation. The Hickenlooper amendment also explicitly does not apply where the executive branch indicates that adjudication would embarrass the conduct of foreign policy.

The act of state doctrine has been criticized on many grounds. It has been said to interfere with the courts' rightful function in interpreting the law and doing justice to litigants. It has been criticized as preventing United

States courts from participating in the process of formulating international law and as being out of harmony with the practices of many other countries' courts which seem to take a much broader view of their power to adjudicate with respect to the acts of foreign sovereigns. Others have argued that the courts' use of the act of state doctrine has restricted the vigorous enforcement of the laws of the United States. The doctrine also has been said to be superfluous because the conflicts it is intended to prevent may be avoided on such more principled and well-settled grounds as the political question doctrine, _forum_ _non_ _conveniens_, and considerations of comity.

In the past, the Justice Department has not opposed confinement, at least, of the act of state doctrine. In the _Dunhill_ case the State Department presented the view of the executive branch that it would not oppose overruling the _Sabbatino_ case if the Supreme Court chose to do so. More recently, the Justice Department has filed amicus briefs in two cases, urging that the act of state doctrine be interpreted to allow courts to inquire into the circumstances leading to a foreign state's act or its motivation, so as to allow application of the antitrust laws to private conduct intended to induce the act of the foreign sovereign. [*/] The Justice Department also supported application of international law in _Filortiga v. Pena-Irala_, 630 F.2d 876 (2d Cir. 1980), a case involving a tort claim by citizens of Paraguay against another Paraguayan who, as an official of that country, allegedly had tortured the plaintiff's son. In that case the Department urged recognition and application of principles of international law prohibiting official torture, a prohibition which Paraguay also espoused.

[*/] _Hunt v. Mobil Oil Corp._, 550 F.2d 68 (2d Cir.), _cert. denied_, 423 U.S. 909 (1977); _Industrial Investment Development Corp. v. Mitsui & Co._, 594 F.2d 48 (5th Cir. 1979), _cert. denied_, 445 U.S. 903 (1980).

SCOPE OF S. 1434

Before discussing the implications of S. 1434, it is useful to outline the scope of what the bill purports to do. The act of state doctrine is closely intertwined with other jurisprudential doctrines and principles and has often been analytically confused with other defenses sometimes raised in cases involving foreign conduct, such as sovereign immunity and the foreign sovereign compulsion defense. The clearest way to describe the scope of S. 1434 is to outline what the bill will not affect.

o The proposed bill does not affect the immunity of a foreign sovereign to suit in the United States courts. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611, sets forth the circumstances under which a foreign sovereign can be sued in a United States Court and acts as a long arm statute by which *in personam* jurisdiction can be obtained over a foreign sovereign. The enumerated instances in which jurisdiction may be obtained include cases where commercial activity in the United States is carried on by the foreign state, where the suit is based on an act performed in the United States in connection with commercial activity of the foreign state elsewhere, and where there has been an act outside the United States in connection with the commercial activity of the foreign state which act causes a direct effect in the United States. The Foreign Sovereign Immunities Act also permits suit against a foreign sovereign in actions growing out of an expropriation. The action must involve rights in property taken in violation of international law, and the property must be present in the United States in connection with commercial activity carried on in the United

States by a foreign sovereign or the property must be owned or operated by an agency or instrumentality engaged in commercial activity in the United States.

The Foreign Sovereign Immunities Act presents a threshold requirement for suits against a foreign sovereign. Thus, although S. 1434 might allow adjudication of a particular question on the merits, the foreign sovereign cannot be subjected to the claim unless the "minimum contact" requirement represented by the Foreign Sovereign Immunities Act is first met.

o S. 1434 explicitly does not modify the defense of foreign sovereign compulsion. It also apparently would not restrict other means of judicial deference such as the political question doctrine or dismissal on grounds of *forum non conveniens*.

Although the bill states that it shall not be deemed to *modify* the foreign sovereign compulsion defense, it is possible that this language may be interpreted to freeze that defense in its present form. This would be an unfortunate result since at present there is no clear consensus among the courts and commentators as to the proper application of the foreign sovereign compulsion defense. In order to clarify that the bill does not intend to thwart further development and refinement of that defense and other doctrines relating to foreign conduct, Section 5 should be modified to state that nothing in the Act shall be deemed to affect any doctrines or defenses, other than the act of state doctrine, relating to exercise of jurisdiction or application of legal principles to the decision of cases by courts in matters involving the conduct or interest of foreign states.

- The proposed legislation also does not affect the application of municipal law of the United States to acts of foreign sovereigns, absent applicable principles of international law. Thus the legislation would not resolve the difficult questions raised in some recent antitrust cases concerning the "extraterritorial" application of the United States antitrust laws to foreign countries' arguably commercial activities, issues such as troubled the Ninth Circuit in International Association of Machinists and Aerospace Workers v. OPEC, 1981-1 Trade Cases ¶ 64,143, ___ F.2d ___ (9th Cir. 1981).

  Similarly, the bill would not affect the act of state doctrine insofar it prevents United States courts from determining the validity of an act of a foreign state under that sovereign's own laws.

- Another area of uncertainty left unresolved by the bill is the refusal by some courts to examine the circumstances leading to a foreign sovereign's act if that act was the immediate cause of the plaintiff's injury. This situation occurs most commonly in antitrust cases where defendant firms are alleged to have induced a foreign government to deprive a competitor of various kinds of commercial rights in the foreign country. As noted above, the Justice Department has filed amicus briefs supporting the view that the act of state doctrine only precludes inquiry into the validity of the act of state itself, not the circumstances leading to that act. This approach allows examination of private conduct intended to induce the act of the foreign state in order to determine whether the private conduct violated the antitrust laws. S. 1434 would not affect the outcome of such cases in the absence of a claim that the act of the foreign sovereign itself was in violation of international law.

ANALYSIS

The scope of the proposed legislation therefore is limited to modifying the act of state doctrine to permit courts to analyze the legality under international law of the conduct of a foreign sovereign, either in litigation against the foreign sovereign when the Foreign Sovereign Immunities Act allows jurisdiction, or in cases against a private individual where the validity of an act of a foreign state is at issue.

The remarks made when this bill was introduced and the scope of S. 1434 indicate that the goal of the legislation is essentially twofold. First, to give individual plaintiffs a forum for remedying wrongs against them by foreign sovereigns, especially in instances of expropriation or egregious violations of human rights. Second, to encourage the development of international law and concurrently to discourage violations of international law.

S. 1434 actually may provide redress for litigants in very few cases because the courts heretofore have tended not to find a clear body of international law. On the other hand, if the courts view this legislation as an invitation to interpret international law more expansively, there are a number of potential risks that the Justice Department believes should be evaluated. Legislation which is interpreted by the courts to mandate aggressive development of international law and application of that law to the conduct of a foreign sovereign may have an adverse effect on our foreign relations in light of the present perception by some nations that the United States has been taking too broad a view of the extraterritorial application of its municipal laws. In addition, an expansive definition of international law by the courts could create a new body of law to be applied in purely domestic litigation, and may pose new problems of interference with the executive in the area of foreign affairs. I will discuss the possible implications of the expansion of international law under S. 1434 in greater detail in a few moments. First, I will describe the courts' present more restrictive view.

The United States courts have tended to give a very restrictive interpretation to international law. The Supreme Court in Sabbatino indicated that the question of the limitations on a state's power to expropriate the property of aliens is an unsettled question in the realm of international law. ~~376 U.S. at 428-29.~~ Similarly, the Hickenlooper amendment, which already provides for application of international law in expropriation situations, has been interpreted very narrowly by the courts. Several courts, for example, have refused to adjudicate cases involving the Libyan expropriation of American companies' oil properties, and one has done so on the ground that international law concerning adequate compensation in cases of expropriation is unclear. Indeed the only case in which the Hickenlooper amendment has been applied to permit adjudication in an instance of expropriation was on remand in the Sabbatino case itself. The courts' views of the existence and certainty of international law principles would not necessarily change dramatically as a result of S. 1434.

Thus even though S. 1434 permits courts to apply international law to the conduct of foreign sovereigns, they might do so in few cases because of perceived uncertainties in the substance of international law. If, however, enactment of S. 1434 were interpreted by the courts as a mandate for greater judicial activism in defining and applying international law, a number of other issues are raised.

An expansive interpretation of international law, coupled with an exception to the act of state doctrine allowing that law to be applied in the courts of the United States, may aggravate an already existing problem regarding foreign nations' resentment of what is perceived as the extraterritorial application of United States municipal law to international business transactions.

S. 1434 would not deal with the problem of what has been called the "extraterritorial" application of United States laws to international business transactions. The Justice Department agrees that the present bill is not an appropriate vehicle for resolution of these problems and anticipates that they may best be dealt with by way of bilateral agreements with our major trading partners to define the circumstances in which each country's law would be applied. However, insofar as S. 1434 is viewed in the international community as an invitation for the United States courts to aggressively develop unsettled areas of international law and to apply that law to activities of other sovereign states, this legislation may be viewed as another manifestation of what many foreign nations feel is a tendency by the United States to act as an international policeman -- especially in commercial activities.

An additional concern raised by the potential for an expansive or aggressive development of international law is that the law may have a restrictive effect on our domestic affairs. There may be some occasions on which the courts are presented with evidence of international custom which goes beyond what is required by our own laws. For example, very recently a federal district court in Kansas held that certain aliens who were in this country illegally were being detained in custody in violation of their human rights, not as those rights are defined by the laws of this country, but as defined by international law. Thus, S. 1434 must be examined with a view toward not only the consequences of applying international law developed by the courts to foreign states, but also the consequences of applying such law in purely domestic litigation, including litigation against the United States. Moreover, if the courts develop standards of international law in areas which previously were thought to be unsettled, the practical effect may be that the executive will have to adhere to that interpretation of international law in its dealings with foreign countries.

This leads me to one final point. The act of state doctrine has been said by the courts who have created it to have constitutional underpinnings. Although the Supreme Court stated that the doctrine is not constitutionally required, it has articulated a basis for the doctrine in the principle of separation of powers. Courts have been extremely reluctant to involve themselves in passing judgment on the activities of foreign sovereigns even when the activities have effects in the United States and are alleged to be in violation of the municipal laws of the United States. Because courts have injected themselves in this area so seldom, there are, perhaps, few examples of the dangers of courts' interference in that realm. However, if the courts begin to involve themselves in the articulation and definition of a new body of law in the international realm, there may be a new risk of interference with the executive functions in the area of foreign affairs.

Thus, the Justice Department cannot support S. 1434 in its present form. While the bill would seem to affect the outcome of few cases if the courts' present restrictive view of international law continues, the bill may invite expansion of international law. Because of risks and uncertainties posed by the creation and enforcement of a new body of international law without the involvement of the executive branch, the potential gain does not seem to justify the potential risk.

The Department does believe that this bill is representative of a whole area of law that is worthy of further study. And as I have noted, there are many related areas of uncertainty.

Senator **Mathias**. Now, our next witnesses will be a panel comprised of Mr. Joseph Griffin, Mr. Stanley Marcuss, and Mr. G. Henry Schuler.

Gentlemen, have you any preference as to how you will proceed?

Mr. **Griffin**. Mr. Chairman, with your permission, I am Joseph Griffin, and I will proceed first.

Senator **Mathias**. Fine, Mr. Griffin, and if the other members of the panel will identify themselves for the benefit of the recorder.

Mr. **Marcuss**. Mr. Chairman, I am Stanley Marcuss.

Mr. **Schuler**. And I am Henry Schuler.

STATEMENT OF JOSEPH P. GRIFFIN, PARTNER, WALD, HARKRADER & ROSS

Mr. **Griffin**. Mr. Chairman, I will begin by making one or two comments about Ms. Kuhl's testimony. I found somewhat ironic, as did Professor Wallace, the Justice Department's fear that somehow the executive branch will be disenfranchised from participation in the development of international law if this bill were to be enacted.

Some history might be in order, or refreshing of recollections might be in order. It is interesting to note that the reason the Foreign Sovereign Immunities Act was enacted was because both the State Department and the Justice Department supported enactment of the bill, in fact, they suggested it. The reason they did was that they wanted to get out of the business of having to make these kinds of decisions, and they wanted to turn the decisionmaking process over to the courts.

I might also note that in the two most famous cases involving these issues in recent times. In the first one, the *OPEC* case, the trial judge specifically requested the Justice Department to participate and make a filing and give him the benefit of its views, and it declined.

In the *Uranium Cartel* case, five foreign governments petitioned the Justice Department and State Department and asked them to file papers expressing the U.S. Government's point of view in that litigation, and the Government refused to make any filings until after the seventh circuit had made a ruling which erroneously interpreted the act of state doctrine, and also, if you will, slandered, at least in their own minds, the foreign governments. It was at that point that the then legal adviser made a filing.

It is also interesting to note that in the last two filings in the Supreme Court in the antitrust area, the *Hunt* case and the *Mitsui* case, both filings by the Justice Department took the tack that the Supreme Court should either ignore the act of state doctrine as it applied in that case, or apply an exception to the act of state doctrine as it applied in that case.

So I do not think the Justice Department's record in terms of being in the forefront of development of the law in this area is very sterling at all. In fact, it has been conspicuous by its absence from the leading cases in recent years.

As Mr. Robinson pointed out in his testimony—and I have been asked to limit my testimony to the antitrust area—the application of the act of state doctrine in the antitrust area has been very inconsistent by the courts. Part of the problem has been that the act of state doctrine developed in other areas, primarily expropriation and, later, human rights, and one of the difficulties from the beginning has been how much of the doctrine is transferrable into the antitrust arena.

The Supreme Court has not addressed the issue of the interplay of the act of state doctrine and the antitrust laws since 1927 in the *Sisal Sales* case. Since that time there has been no Supreme Court decision involving the act of state doctrine and the antitrust laws.

The lower courts have developed two different approaches to the interaction of the act of state doctrine and the antitrust laws. Under one line of cases the court presumes that it is barred by the act of state doctrine from adjudicating the validity of an act of a foreign sovereign, and then inquiries whether there is an exception to the doctrine which would permit it to undertake such an adjudication. Various courts and commentators have suggested a number of exceptions to the act of state doctrine, including commercial as opposed to governmental acts, acts that are the product of corruption, acts solicited by private defendants, acts that are ministerial as opposed to those that are part of an integral governmental function, and sovereign acts that are unlikely to precipitate hostile foreign governmental reaction if challenged. None of these exceptions has been unanimously recognized by the courts.

In the second line of cases, the court does not begin with the presumption that the act of state doctrine bars adjudication of the validity of the act of a foreign sovereign. Rather, the court balances a number of factors in order to determine whether abstention or adjudication is appropriate. Factors to be balanced may include the existence of one or more of the exceptions I have listed above, and other factors such as the motivation of the foreign sovereign, the position of the executive branch of the U.S. Government, if any, as to whether the act of state doctrine should bar adjudication, the degree of international consensus on the rule of law at issue, and the likelihood of obtaining an effective remedy. Here again, however, the courts that follow this balancing approach have not produced an agreed list of relevant factors to be balanced.

The most recent case which several previous speakers have alluded to, the *OPEC* case, is particularly relevant because, first, it was an antitrust case, and second, the Court offered two different rationales for its decision. One is the traditional separation of powers/noninterference rationale. More interestingly, I think, for the issue today, the second rationale offered by the Court was the admonition in the *Sabbatino* decision by the Supreme Court that courts should consider the degree of codification or consensus concerning relevant international legal issues in evaluating whether to inquire into the validity under international law of an act of a foreign sovereign.

The ninth circuit concluded that it would be inappropriate to examine OPEC's cartel activities because although such activities are clearly illegal under U.S. law, there was no evidence in the record of an international consensus condemning the types of activities engaged in by OPEC.

Another point mentioned by several speakers is the difference between the application of the act of state doctrine and the extraterritorial application of U.S. antitrust laws.

As the chairman is well aware, that is a very controversial subject. I know you have a bill pending to establish an International Antitrust Commission that would study that amongst other issues.

In analyzing antitrust suits, our courts first determine whether jurisdiction exists; and if so, whether to exercise jurisdiction before they reach the question of the application of the act of state doctrine. The type of case-by-case balancing approach of U.S. and foreign governmental interest mandated in what has become known as the Timberlane/Mannington Mills jurisdictional rule of reason mode of analysis may provide a procedure for weighing the legitimate interests of foreign sovereigns, the executive and legislative branches' concerns over foreign affairs, and separation of powers concerns.

The typical act of state case involving expropriation or actions of foreign sovereigns relating to human or property rights, often involves well-developed doctrines of international law. Where the act of a foreign sovereign violates these international norms, S. 1434 would bar dismissal based on the act of state doctrine.

In contrast, S. 1434 is not likely to have a significant impact in the antitrust context. As the *OPEC* decision illustrates, there is no international law of antitrust. Moreover, many foreign governments regard the extraterritorial application of U.S. antitrust laws to the conduct of aliens outside the United States as a violation itself of international law.

Thus, although S. 1432 would permit examination of the act of a foreign sovereign, such examination probably would reveal a lack of international consensus on the legality under international law of the act at issue and of the basis upon which the U.S. jurisdiction is asserted. Consequently, dismissal on the ground of the act of state doctrine would remain an available option.

In any event, a careful case-by-case approach to sensitive issues would continue after enactment of S. 1434, and the chance that the U.S. Government would speak with two inconsistent voices, that is, the executive versus judicial, in a specific situation would not increase significantly, because the executive is often asked to submit its views on the jurisdictional rule of reason weighing approach.

This leads me to the issue you raised, Mr. Chairman, of why some members of the antitrust bar oppose your bill. As a member of the antitrust bar, I can say that I support the bill, but I think the basic concern, as one friend of mine expressed it, is that the act of state doctrine provides for a merciful quick kill of litigation. That is the problem—and I think the difference, if you take a case like *Hunt* v. *Mobile Oil* or the *OPEC Cartel* case. Rather than simpy introducing a few pieces of paper and arguing that there was an act of state, and that the court is not allowed to inquire into its legality, and therefore having a quick dismissal of the case on that ground, you——

Senator MATHIAS. Are you suggesting that the bar has some personal interest in prolonging litigation?

Mr. GRIFFIN. I would certainly never suggest that, Mr. Chairman.

Senator MATHIAS. You are raising the specter of the young lawyer who graduated from law school and took over the office while his father went on his first vacation in many years. The father came back and asked how things had gone, and he said very well. He said, "I even settled the *Randolph* case." The father said, "Oh, you didn't do that, did you? I have sent you through 4 years of college and expected to get your sisters and brothers through college on the *Randolph* case." [General laughter.]

Mr. GRIFFIN. Well, I will not ascribe motives to any of my colleagues in the antitrust bar, but I think their point is that the act of state doctrine as it presently exists does provide for a quick kill of a case as opposed to what would be mandated under 1434, which would be an inquiry into the validity under international law of the act of the foreign sovereign.

My point is that the inquiry might well result in the case still being dismissed because either there is no international law of antitrust or because jurisdiction is not well founded, or because of comity or because of the application of the political question doctrine.

As Professor Wallace pointed out, Judge Choy in his decision in the *OPEC* case went out of his way to list the other grounds upon which the case could be dismissed if act of state were not an appropriate ground. I do not think there is any shortage of grounds upon which these kinds of cases can be dismissed.

I do think that S. 1434 makes a very important contribution in the antitrust field in its finding in section 2 that the act of state doctrine is conceptually and legally separate and distinct from the defense of foreign sovereign compulsion.

In summary, S. 1434 may not have as great an impact on antitrust litigation as in other fields of law because of the absence of an international agreement on antitrust standards, on extraterritorial jurisdiction, and because of the emergence of the jurisdictional rule of reason. Nevertheless, it represents the recognition of the importance of international law in our legal system and provides the opportunity for our courts to examine and to balance properly on a case-by-case basis legitimate interests of foreign governments and antitrust litigants.

Thank you, Mr. Chairman. I would be happy to answer any questions.

Senator MATHIAS. Thank you.

We will hear from your colleagues and then save the questions I think for the panel.

STATEMENT OF STANLEY J. MARCUSS, PARTNER, MILBANK, TWEED, HADLEY & McCLOY

Mr. MARCUSS. Mr. Chairman, I want to congratulate you for wading into this extremely difficult and complicated area. And indeed, as I reflected upon it, one of the advantages of your legislation is that I suppose, like the *Randolph* case, it could help send my kids through college.

Senator MATHIAS. On the other hand, if I wipe out a whole area of litigation, what am I going to do in the days to come when I go back to earning an honest living? [General laughter.]

Mr. MARCUSS. One of my principal concerns, Mr. Chairman, about the legislation—and I do not mean by that to say that I do not think that some action in this area might be necessary—is that it seems to me it will subject U.S. citizens and corporations who find themselves governed by foreign laws to the possibility of double liability, or at least to enormous uncertainty in planning their personal and corporate affairs. If, for example, a U.S. court viewing the matter retrospectively concludes that they have reached an incorrect legal conclusion, they will find themselves facing the possibility of double liability, certainly the possibility of long litigation.

It seems to me it is manifestly unfair to require U.S. citizens to assess at their own peril the legality of a foreign government's actions under the limited jurisprudence that exists today under international law. And I for one find it hard to see how placing them between the proverbial rock and a hard place is an improvement over the present system.

Mr. Chairman, most of the discussion of this issue tends to focus on expropriation cases in circumstances where there is seemingly significant unfairness in the results that have been produced from the application of the act of state doctrine. Most of the other jurisprudence in this area is in the antitrust area where there has been a fair development of applicable principles and I think a consensus, in some quarters at least, that there is a discernible and rational and somewhat predictable body of law emerging.

What I would like to focus on, and I think the committee should focus on, Mr. Chairman, as you proceed in your deliberations, are a number of possible situations which the courts have not typically dealt with and do not, at least in most literature, seem to be analyzed in terms of the consequences of denying the availability of the act of state doctrine.

In my testimony, Mr. Chairman, starting at page 8, I have set forth a number of hypothetical examples that seem to me to illustrate the kinds of situations that the committee should focus upon before it is satisfied that it would be creating a more predictable, more fair, more stable regime of law than now exists, even admitting that there are significant uncertainties and inconsistencies in the application of the act of state doctrine today.

With your permission, Mr. Chairman, I will take a minute or two to go through one or two of these hypotheticals—the rest are available for the record—to see whether my fellow panel members or anyone else might have some thoughts as to why elimination of the availability of the act of state doctrine in these circumstances is preferable to the current situation.

In the first example, Adams Corp., a U.S. company, licenses its secret manufacturing process to a foreign subsidiary of Brown Corp., also a U.S. company. As part of the licensing agreement, Brown promises to protect the secrecy of the process. The foreign country where Brown's subsidiary is doing business then enacts a law requiring all foreign corporations doing business in that country to transform themselves into joint ventures with indigenous companies so that domestic expertise and infrastructure can be developed.

Now, in entering into such a joint venture, the Brown Corp. discloses the manufacturing process to the native company after concluding that it is required to do so under local law. The new law does not provide compensation for the forced disclosure of these trade secrets, and that is arguably a violation of international law as a taking without just compensation.

In the United States, Adams Corp. then sues Brown for violation of the licensing agreement, and seeks damages.

Now, as I understand it, under S. 1434, neither the act of state doctrine nor the foreign sovereign compulsion defense would be available to Brown, even though it had acted in accordance with the law of the foreign country. Although there was compulsion, since this is not an antitrust case, the foreign sovereign compulsion defense is not available. Brown Corp. in that circumstance faces a potential liability. That's one.

Another example: Cryon Corp. hires 30 skilled American workers in the United States to travel to a foreign country where it is building a plant. These workers have been assured that they and their families will be housed in luxurious, American-style communities built by the company. While the workers are present in the foreign country, a group of xenophobes seizes power and decrees that all aliens resident within the country shall live only in designated, highly undesirable areas of each city. That decree arguably violates international law because it discriminates against aliens without a reasonable basis.

The Americans live in the designated areas until the completion of their work, but upon their return to the United States, they sue their employer for damages, claiming that their children have suffered psychological harm from the company's failure to keep its promises. If S. 1434 were law, neither the act of state doctrine nor the foreign sovereign compulsion doctrine would provide a defense for the company.

Mr. Chairman, I could go on. There are many other such situations, and I have outlined them in my prepared testimony, and I will not go through them here, but my basic point is that one can conceive of a number of not very farfetched situations in which a fundamental unfairness would result by virtue of the fact that the act of state doctrine would not be available, and at a minimum, significant uncertainty would surround the conduct of international business transactions.

In each of the hypothetical examples that I have set forth, a person or a corporation would be required to stand trial in a U.S. court because of harm caused by the wrongful act of a foreign government. In addition, S. 1434 would have the ironic result, it seems to me, of providing defendants in each of those kinds of situations with a very strong incentive to argue that the foreign act was legal, whatever they may believe about its legality.

And in addition, it might, in many circumstances, cause U.S. courts to tilt in the direction of finding a foreign sovereign's act to be legal, whatever its basic views about the legality might be, just because of the unfairness that would otherwise result.

Now, this is not to state that there is no room for legislation on this subject. There is no question that the act of state doctrine has been applied in a number of circumstances where it appears to have permitted a foreign government unfairly to take advantage of its own wrongdoing. You pointed this out in your writings and your speeches on this subject.

But I do not think that its wholesale abolition is the best way to proceed. I think Congress could take other approaches in improving the law in this area while minimizing potential new problems. Let me suggest two possibilities.

One would be to follow in the footsteps of the Foreign Sovereign Immunities Act and codify the act of state doctrine in appropriate formulation. Now, I know you have reservations about that. Professor Wallace suggested some reservations. But it seems to me one really cannot form a definitive judgment on the utility of that approach until one has at least tried a draft to see what it would look like, and identified the various factors that might be employed. It seems to me that by codifying the doctrine, Congress could eliminate some of the conflicting analysis that is now visible in the cases in which the doctrine has been invoked. This would certainly reduce the legal unknowns that exist. Through codification Congress could decide whether it wished to require the courts to balance certain factors, and which factors it wished the court to balance in deciding whether to apply the doctrine. And, of course, among those factors would be the degree of consensus that exists on the particular matter of international law. I think that by requiring consideration of the degree of clarity on a relevant matter of international law Congress would promote the growth of international rules and principles while reassuring parties where uncertainty prevails that they will not suffer.

I think that through codification, or at least through the process of attempting to codify, Congress could also determine the degree to which the doctrine should serve as a device for preserving the prerogatives of the executive branch. Congress clearly could and probably would review the Bernstein exception. Congress might also consider whether it is desirable and feasible to deal specifically with situations where it is alleged that the defendant generated or encouraged the act of state that gave rise to the plaintiff's harm.

It could also deal with situations where an instrument of the foreign government seeks to take advantage of its own allegedly illegal action.

Congress might also specify the criteria that should be applied by the courts in examining whether a particular act is an act of state. Congress could also decide the degree to which it wished the courts to pursue the approach recently articulated by the Second Circuit in Filartiga and so forth.

Now, as an alternative to codification, Mr. Chairman, I would suggest that the Congress consider expansion and codification of the foreign sovereign compulsion defense. At a minimum, this would require an inquiry into whether that defense should be broadened to absolve organizations or individuals from any liability, not just antitrust liability. It seems to me personally, Mr. Chairman, that that is a profitable route. The inquiry would certainly involve an examination of the degree of coercion that Congress considered sufficient for foreign sovereign compulsion defense purposes and so forth.

Reliance on foreign sovereign compulsion as a replacement for act of state would undoubtedly raise difficulties. I point them out in my testimony. But it seems to me that if Congress were to proceed with a careful examination of that possibility as an alternative, it would certainly be proceeding from familiar territory, and could certainly build at the edge of familiar territory.

Now, there may very well be many other sensible approaches, Mr. Chairman. While I have no firm recommendation at present on how to proceed, I do not believe the time is yet ripe for enactment of legislation along the lines of S. 1434. I would strongly suggest, however, that if the problem with act of state is inconsistency in its application and rationale, as well as occasional unfairness in its application, then the cure is not to adopt legislation that would perpetuate those problems but merely shift them to other shoulders. Imperfections that we know may very well be preferable to those that we do not.

Mr. Chairman, when I was in the Government I used to have to pretend I knew the answers to questions on which I was asked to testify. I am grateful for the opportunity not to have to pretend I know the answers to these very difficult questions that you have raised and identified today.

Senator MATHIAS. Thank you very much.

STATEMENT OF G. HENRY M. SCHULER, DIRECTOR FOR ENERGY PLANNING AND DEVELOPMENT, DELOITTE HASKINS & SELLS

Mr. SCHULER. Senator Mathias, my name is Henry Schuler. I am director for energy planning and development at the firm of Deloitte Haskins & Sells, and I want to emphasize that I am not here as representative of my firm or representing any client. I am here strictly in my personal capacity because of experiences that I have had in the past with the act of state doctrine and its very pernicious effect on the operation of international oil companies overseas in this very difficult period.

I have submitted a written statement, but I would like to get away from that and simply talk about these practical ramifications.

Senator MATHIAS. Your full statement will be included, of course, as will all.

Let me just say that the point of view you represent is, I think, a significant one because the world is so much more complicated today, the economies of different countries are so much more integrated with each other or in collision with each other, however you may view it, and therefore this is the kind of problem which we may not be able to avoid, even though, like Mr. Marcuss, we may not know exactly how to cope with it.

Mr. SCHULER. You are absolutely right, and it is complicated to the extent that political and commercial concerns are so intertwined now that you cannot make a valid distinction between them.

Senator MATHIAS. And that will be increasingly the case if the Global 2000 report is even half right. With the enormous increase in world population, the necessary mining of each other's resources of various kinds in order to keep the world economy moving is just going to require a lot more commercial interface and economic interface than we have ever imagined in the past.

Mr. SCHULER. And it has its pernicious side as well. You may recall, Senator, as a member of the committee investigating Billy Carter, that I testified to that committee, again in my personal capacity, on the relations between the United States and Libya, and the deterioration of those, and I was asked if I thought a confrontation and collision was coming, and I testified that I did in fact think that it was imminent. Unfortunately, that proved entirely too valid as of the events of a couple of weeks ago.

And I think the reason for that, or certainly a contributing factor to that and the reason why I was convinced then and I remain convinced now that a collision is coming is that we have precious few weapons to use, weapons of a nonmilitary sort, to use in combating the power of the oil-producing states, and when we deny to ourselves even the jurisdiction of the American courts, we are forced into a position where we drift into this military confrontation.

I think that the application of the act of state doctrine has meant that American oil companies operating overseas have had to accept conditions, have had to accept unilateral changes in agreements that they had entered into under the threat of expropriation because they knew they had no viable way to defend themselves even in their own American courts. This has also meant that companies in recent years have not pursued overseas exploration and production activities to the extent that they should because if you cannot protect your assets from expropriation, then many companies choose not to risk those assets. As a result, we do not have the activity internationally in the lesser developed countries that we should have, activity that would serve their interests and would serve our interests at the same time by relieving some pressure on Middle Eastern oil production, some demand pressure.

In my testimony I have highlighted the incident that I think has brought it to my own mind and that I think is probably the most egregious that one could imagine. I would try to highlight that briefly. It arises out of the Libyan nationalizations, nationalizations that were, in several instances, proclaimed acts of political reprisal against the U.S. Government, not against the companies involved.

They started in December 1971 when the Libyans nationalized British Petroleum because Her Majesty's government had permitted the Shah of Iran to occupy several islands in the Persian Gulf. Libya nationalized BP. BP was the operating partner for Nelson Bunker Hunt, whom I represented at that time.

I went down to Libya immediately, met with Maj. Abdul Salum Jallud who was Colonel Qadhafi's deputy, and was told that we were to market BP's oil, the oil that had been expropriated from BP, or Hunt would be expropriated. And we had little doubt that that might very well happen. It was still a period when Qadhafi was testing the limits of Western resolve, so it was not inevitable.

Bunker Hunt could not hide behind a board of directors. He could not plead that he had 200,000 widows and orphans who were living off the dividends. He had to take responsibility himself for the action that he took. So he refused to market BP's oil.

The pressures continued upon us of all sorts. Our operating personnel were thrown out of the field. Our ships were held up. And ultimately the Libyans chose us to be the lead-off batter for the participation demands.

Again, although they might appear to be entirely commercial, the participation demands for 51 percent, which the Libyans posed in the fall of 1972, were designed to upset, to upstage the agreement that Yamani had reached in the Persian Gulf. That agreement was a 25-percent agreement. Qadhafi was determined to show that this was the wave of the future, revolutionary socialism was the wave of the future.

And so the pressure was upon us. We urged the other companies to hang tough in resisting these demands. The other companies said, well, there is nothing we can do. We cannot protect ourselves. We will not have much of a shake in the courts of the world if they are thirsty for oil. We cannot even do anything in the United States because of the act of state doctrine.

Well, we perhaps with insufficient basis, thought that the act of state doctrine, if the Department of State were supporting our position, the position of an expropriated company, would be able to get around the act of state doctrine.

On May 2, 1973, the Libyans finally were able to make their first contract to sell crude oil to an American company. On May 3, another company representative in Libya was told that Hunt's days were numbered in Libya. On May 21, an additional company made an agreement to buy Libyan oil. And on May 24, Hunt was told that we could no longer lift oil.

On the 11th of June, Hunt was nationalized with Colonel Qadhafi and Idi Amin at his side proclaiming that this was a "big, hard blow on America's cold, insolent face." It was deliberately an act of political reprisal.

The State Department protested this as an act of political reprisal, as being contrary to international law. The British Government had previously done so. A Swedish jurist who was appointed by the World Court, the President of the World Court, to arbitrate in the British decision also concluded that it was a violation of international law, and Hunt and BP brought litigation in the United States to chase the so-called hot oil, to attach the cargoes of oil that were coming into the United States from this American company that had purchased the oil.

The judge in the court in Texas, in the Texas District Court, notwithstanding the fact of all these rulings of international law, held—and he agreed that it was an egregious act against the rights of an American citizen, but found that the act of state doctrine barred his consideration of the case.

Within days, several other companies in Libya responded to the Libyans' demand, affirmatively met that demand for 51-percent participation. They saw that there was no way one could get around the act of state doctrine. The 51-percent participation, as I pointed out, upset the arrangements that had been made in the gulf, prompted leapfrogging back and forth, and produced the sort of chaos that we are in today.

The *Hunt* case went to the Texas Supreme Court and was affirmed that the act of state doctrine barred consideration. The U.S. Supreme Court refused certiorari to take the case.

Then, as if to add insult to injury, the company that had purchased his illegally expropriated oil, the American company, brought a suit against Hunt and BP for conspiracy in restraint of trade because Hunt and BP had attempted to assert their rights in the American court, and only within the last 4 months was that case dismissed by the judge, a Federal district judge in Houston.

Although the case was ultimately dismissed, defendants were concerned that the act of state doctrine might preclude their raising the illegality of the nationalization as the cause of their efforts to attach the expropriated oil. If they had been unable to justify their efforts, they might have been found guilty of a conspiracy in restraint of trade, and there was a $75 million claim in that case.

I have gone through this hastily and I see my time is up, but I just think that it is the most egregious example when, in fact, the act of state doctrine is used to protect a foreign sovereign government who has illegally expropriated under international law as a deliberate act of political reprisal against the U.S. Government.

Thank you.

Senator MATHIAS. Thank you very much, Mr. Schuler.

Now, you have given us a good example of the unfortunate results of strict application of the doctrine of act of state.

Mr. Marcuss raises some questions as to the desirability of an outright abolition of the doctrine, the kinds of questions that might result. So Mr. Griffin, you are in the middle.

How would you arbitrate between these two points?

Mr. GRIFFIN. I think the *Hunt* case is a good example. The *Hunt* litigation has many facets, but I think the answer lies in the issue of the primacy of international law. I admit that litigants will be bothered by the fact that there will be no quick kill, there will be an inquiry. I think whether the ultimate result in the *Hunt* case, in the antitrust phase of the *Hunt* litigation, would change really depends on the issue of which there is international consensus on the legal issue. You might well have a different result as to the expropriation phase of the *Hunt* case. That is, the expropriation was in violation of international law. Therefore no act of state protection, therefore, the plaintiff obtains relief.

As to the antitrust phase in the Second Circuit litigation, the result might well not change at all because there the issue was not the expropriation itself but whether or not there had been a conspiracy among the competing oil producers to induce the expropriation. That raises these issues of extraterritoriality and so forth.

Senator MATHIAS. What about Mr. Marcuss' point as to the difficulty of determining the international law?

Mr. GRIFFIN. I do not think it is that great a task. Again, it varies radically with the issue, and it goes back perhaps to the Justice Department's point concerning the development of international law. The development of the international law of expropriation is pretty far along, and there is a wealth of material available to determine whether a particular expropriation is legal or not under international law.

Antitrust is perhaps the opposite extreme. There is no international law of antitrust. The most you have are some guidelines and some U.N. resolutions, but there is nothing approaching the international law there is on expropriation. Human rights is probably somewhere in the middle.

If we have enough confidence in the courts that the executive branch is willing to say to the courts, you sort out issues of foreign sovereign immunity where the sovereign is directly challenged, why can't we have enough confidence to say to those same courts, sort out this issue of act of state, especially in a situation where it is not the sovereign itself that is going to suffer a direct injury, it is the private American who is claiming protection under the act of state doctrine..

Mr. MARCUSS. Mr. Chairman. I would say with respect to the *Hunt* case, at least as described, it seems to me that the generic solution to that problem is clearly not to throw the baby out with the bathwater. It is an expropriation case. It is a case, as I understand it, that involves acquisition of cargo with knowledge or reason to know that the expropriation was alleged to be illegal under international law. It seems to me that might very well suggest a category of cases with respect to which automatic invocation of act of state may be inappropriate.

Senator MATHIAS. Well, can you help the committee in determining some kind of formula by which we could suggest where it is appropriate and where it is inappropriate, because I think that is what you come down to.

Mr. MARCUSS. That is what I come down to, and I think the first step in that process is to identify the various choices that might be involved, and be willing to look at the questions: whether the foreign government is a plaintiff, whether the foreign government is a defendant, whether only private parties are involved, whether the right that is asserted or the harm that is alleged in the course of litigation is the result of an act of a foreign government that is arguably an act of state. One can look at the question of whether it is expropriation only that is at issue. One can look at the question of the degree of certainty about international law and so forth.

The result of that exercise, it seems to me, from a congressional point of view, should be some weighing and balancing, articulation of how the Congress wishes those particular factors which the courts to some degree now weigh anyway, ought to be weighed. Maybe in some circumstances the Congress would conclude that this kind of case, an expropriation case, for example, is wholly inappropriate or almost always inappropriate for subjugation to the act of state doctrine, but other kinds of cases which inherently involve complicated questions of private law between parties, and there just happens to be an extra act of state dimension to it, are not appropriate for act of state conflict.

Senator MATHIAS. Mr. Schuler?

Mr. SCHULER. I would add to that they try to be as clear as possible. I mean, the people who are going to be applying these, looking at it from my perspective of being at the other end and not being the lawyers arguing after the fact of what happened or not, but looking at it from the other end and trying to decide, do I accept that unreasonable demand which is against the interests of my country and consumers everywhere, and in the process risk my assets? If it is too fine a line and there is too much legalistic hairsplitting, too many open questions in that respect, the decision is going to be supercautious which says, OK, I will accept the demand that the Libyans levy on me, or I am not going to go overseas. I am simply not going to get involved.

And again, from my perspective, which is that we cannot afford to have this happen, we want you to give us as clear a signal as you possibly can of the way that act of state doctrine will be applied, if it is to continue to be applied.

Senator MATHIAS. You are making a very serious demand on the Congress.

[General laughter.]

Senator MATHIAS. Well, let me ask Mr. Schuler, do you think if this bill had been passed, the outcome of that *Hunt* case might have been different?

Mr. SCHULER. Certainly from my understanding of it, and I am not attempting to be a lawyer—the firm Deloitte Haskins & Sells sounds like a law firm, but it is not—but I cannot speak to it as a lawyer, but my understanding of it is that it certainly would have because it would have—there was a clear ruling by a Swedish jurist who had spent 18 months investigating it, appointed by a Pakistani chief judge of the World Court, so there was no great power versus little power argument. The State Department had expressly said it was a violation of international law and had urged, in fact insisted that Hunt assert its rights by bringing litigation against parties bringing oil into the United States on sort of a self-help doctrine: you look after yourself first before we get involved in it.

Senator MATHIAS. Mr. Griffin.

Mr. GRIFFIN. Mr. Chairman, I just want to say something in support of Mr. Marcuss' thoughtful statement. I think that the idea of a codification of foreign sovereign compulsion is a good idea. I do not see it as necessarily an exclusive alternative to this legislation. I think it would in fact be a helpful addition. I think that this legislation is correct in its finding that the foreign sovereign compulsion defense is conceptually and legally distinct from the act of state doctrine, and one of the problems we have had is that the courts and sometimes enforcement agencies continually confuse those two. I think that Mr. Marcuss has set forward a number of thoughtful examples in his testimony.

I am not sure that I agree with him that the foreign sovereign compulsion defense is now limited to antitrust cases. I would be willing to litigate that point as a litigator, but it is clear that the only affirmative statements of the defense are in antitrust cases. I do not think the negative is true. That is, I am not aware of any leading cases where courts have said it does not apply outside the antitrust area.

But I would urge you to consider expanding the bill to include a codification of the foreign sovereign compulsion defense.

Senator MATHIAS. Let me ask you just one last question.

If this bill were to be enacted, say, in its present form, would an American plaintiff be able to sue OPEC?

Mr. GRIFFIN. The short answer to that is anybody can sue anybody for anything.

Senator MATHIAS. Successfully?

Mr. GRIFFIN. That is the point.

Senator MATHIAS. Successfully.

Mr. GRIFFIN. I think the answer is no, because I think Judge Choy's reasoning for——

Senator MATHIAS. We could have passed this on the consent calendar this afternoon if your answer had been otherwise.

Mr. GRIFFIN. I think the point is you could sue, but as Judge Choy pointed out, there were perhaps four or five other grounds for dismissal other than the act of state doctrine. I go back to my opening comment, frankly part of the problem in the *OPEC* case was the deafening silence of the U.S. Government throughout that litigation. Some people say that the executive branch had no political choice but to remain silent; it simply could not be seen to be coming into court in support of the cartel. The simple fact is that I did not note any great development of international law on the part of the executive branch in that case or in any other leading cases, and I think if we wait, if we do not pass this legislation or something like it and wait for the executive branch to develop the law for us, it is going to be a long, long time coming.

Senator MATHIAS. Thank you very much, gentlemen.

You have been very helpful. Again, I remind you we will hold this record open for 3 weeks. If you have further thoughts or refinement of your statements today, you may submit it.

[The prepared statements of Messrs. Griffin, Marcuss, and Schuler follow:]

PREPARED STATEMENT OF JOSEPH P. GRIFFIN

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear today, at the invitation of the Subcommittee, to discuss the potential impact of S. 1434 on litigation under the U.S. antitrust laws.

I am a partner in the Washington, D.C. law firm of Wald, Harkrader & Ross and an Adjunct Professor of Law at Georgetown University Law Center where I teach a graduate law seminar on "International and Comparative Antitrust Law." I also serve as Chairperson of the D.C. Bar Association's International Division and as an officer of the Section of International Law of the American Bar Association. My legal practice includes advising and representing a wide range of clients involved in transnational business transactions including American firms, trade associations, foreign firms and foreign governments.[1/] My comments today are personal ones and are not made on behalf of any professional organization or client.

I support the concepts and goals of S. 1434 as I understand them, i.e., to provide for the application of international law by U.S. courts and to bring a degree of much needed clarity to the subject of foreign governmental involvement in litigation under the U.S. antitrust laws.

The act of state doctrine typically arises in antitrust cases in three situations. First, a foreign sovereign or its instrumentality is sued for violating the U.S. antitrust laws and asserts that its challenged conduct is within the act of state doctrine and that, therefore, the court must dismiss the suit because the U.S. courts are barred from adjudicating a claim based on such conduct. Second, a private defendant sued

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[1/] My firm and I are registered pursuant to the Foreign Agents Registration Act on behalf of the Government of Australia.

under the U.S. antitrust laws asserts that the plaintiff's claim requires the court to inquire into acts of a foreign sovereign and that such an inquiry is barred by the act of state doctrine. Third, a foreign government initiates an antitrust suit and the defendant files a counterclaim against the foreign government which, in turn, raises the act of state doctrine as a defense to the counterclaim.

The interaction of the antitrust laws and the act of state doctrine has given rise to a great deal of confusion. Courts often fail to distinguish properly among the following issues: the extraterritorial reach of the antitrust laws, foreign sovereign immunity, foreign sovereign compulsion, the act of state doctrine and conflicts of laws principles.

The act of state doctrine was first applied in an antitrust context in the 1909 American Banana[2/] case which involved a complaint for treble damages by the American Banana Company to the effect that the United Fruit Company had monopolized and restrained the importation of bananas from Central America into the United States. American Banana alleged that the Costa Rican militia had driven its employees off its plantations in Panamanian territory occupied by Costa Rica, had seized the plantation and a cargo of plantation supplies, and had stopped construction of a railway being built by the plaintiff. All of these actions were allegedly instigated by the defendant, United Fruit Company.

In an opinion written by Justice Holmes, a unanimous Supreme Court held that the complaint did not state a cause of action because: (1) the acts causing the damage were done outside the United States and were, therefore, not within the purview of the Sherman Act; and (2) the seizures by Costa Rican soldiers were acts of a foreign sovereign, the validity of which

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[2/] American Banana Co. v. United Trust Co., 213 U.S. 347 (1909).

could not be challenged under the act of state doctrine as enunciated in Underhill v. Hernandez.[3]

Eighteen years later in United States v. Sisal Sales Corp.,[4] the Supreme Court held that the private American defendant could not utilize the act of state doctrine as a defense despite the fact that Mexico and Yucatan had enacted discriminatory legislation to assist it in monopolizing sisal trade in Yucatan. According to the Court:

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. 5/

The Supreme Court has not reexamined the role of the act of state doctrine in antitrust enforcement since the Sisal case. However, Sisal began the trend of distinguishing bases of jurisdiction from the issue of the applicability of the act of state doctrine.

In more recent times the Supreme Court and lower courts appear to have rejected the first rationale offered by Justice Holmes in American Banana, i.e., that the Sherman Antitrust Act does not apply to anticompetitive acts done outside the United States.[6] However, the Court has never expressly overruled American Banana. As this Subcommittee is well aware, the application of the Sherman Act to acts done outside the United States continues to be a verv controversial topic.[7]

3/ 168 U.S. 250, 252 (1897).

4/ 274 U.S. 268 (1927).

5/ Id. at 276.

6/ See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)

7/ See Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws (J. Griffin ed. 1979).

Today courts take two different approaches to the interaction of the act of state doctrine and the antitrust laws.[8/] Under one line of cases the court presumes that it is barred from adjudicating the validity of an act of a foreign sovereign and then inquires whether there is an exception to the doctrine which would permit it to undertake such an adjudication. Various courts and commentators have suggested a number of "exceptions" to the act of state doctrine including: "commercial" (as opposed to "governmental") acts, acts that are the product of corruption, acts solicited by private defendants, acts that are "ministerial" (as opposed to "policy oriented"), and sovereign acts that are unlikely to precipitate hostile foreign governmental reaction if challenged. None of these "exceptions" has been unanimously recognized by the courts.

In the second line of cases the court does not begin with the presumption that the act of state doctrine bars adjudication. Rather, the court balances a number of factors in order to determine whether abstention or adjudication is appropriate in the case before it. The factors to be balanced may include the existence of one or more of the "exceptions" listed above and other factors such as: the motivation of the foreign sovereign, whether the executive branch has informed the court of its position as to whether the act of state doctrine should bar adjudication, the degree of international consensus on the rule of law at issue, and the likelihood of obtaining an effective remedy. Unfortunately, the courts that follow this balancing approach have not produced an agreed list of relevant factors.

[8/] See generally, 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad 238-59 (2d ed. 1981); B. Hawk, United States, Common Market and International Antitrust 118-44 (1979); Meal & Trachtman, Defenses to Actions Against Foreign States Under the United States Antitrust Laws, 20 Harv. Intl. L.J. 583 (1979).

I have attached tc this statement a list of major cases in this area.

The most recent decision in an antitrust case is the July 6, 1981 decision in which the U.S. Court of Appeals for the Ninth Circuit[9/] held that the act of state doctrine is an appropriate basis for dismissing the antitrust complaint filed by the International Association of Machinists and Aerospace Workers challenging the price fixing and other anticompetitive activities of the Organization of Petroleum Exporting Countries (OPEC) and its member nations. Two reasons were offered by the court. The first is the traditional notion of noninterference by the judiciary in the conduct of foreign relations by the President and Congress:

> The remedy IAM seeks is an injunction against the OPEC nations. The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action and the remedy sought. While the case is formulated as an antitrust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are legal, this "would greatly strengthen the bargaining hand" of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions.

The second rationale offered by the court was that in Sabbatino,[10/] the Supreme Court stated that in evaluating whether the judiciary should inquire into an act of a foreign sovereign, the court should consider the degree of codification or consensus concerning the relevant international legal issue. The court concluded that it would be inappropriate for it to examine OPEC's cartel activities because although such activities are "clearly illegal" under U.S. antitrust law there was

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[9/] IAM v. OPEC, ___ F.2d ___ (No. 79-3673), aff'g, 477 F. Supp. 553 (C.D. Cal. 1979).

[10/] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

no evidence in the record of an international consensus condemning the types of activities engaged in by OPEC:

> While conspiracies in restraint of trade are clearly illegal under domestic law, the record reveals no international consensus condemning cartels, royalties, and production agreements. The United States and other nations have supported the principle of supreme state sovereignty over natural resources. The OPEC nations themselves obviously will not agree that their actions are illegal. We are reluctant to allow judicial interference in an area so void of international consensus. An injunction against OPEC's alleged price-fixing activity would require condemnation of a cartel system which the community of nations has thus far been unwilling to denounce. The admonition in Sabbatino that the courts should consider the degree of codification and consensus in the area of law is another indication that judicial action is inappropriate here.

In my judgement, S. 1434 can make a significant contribution to clarifying this very confused area of the law. However, as the OPEC decision illustrates, the area of antitrust is considerably more complicated than the typical act of state case involving expropriation or other actions relating to human or property rights.[11/] There is no international law of antitrust. Moreover, many foreign governments contend that the extraterritorial application of U.S. antitrust law to the conduct of aliens outside the United States is a violation of international law.

In analyzing antitrust suits, our courts must first determine whether subject matter jurisdiction exists and, if so, whether to exercise such jurisdiction before they reach the question of the act of state doctrine. The type of case by case balancing of U.S. and foreign governmental interests mandated by the increasingly accepted Timberlane/Mannington Mills

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[11/] See, e.g., Joelson & Griffin, The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law, 9 Intl. Lawyer 617 (1975).

"jurisdictional rule of reason"[12] mode of analysis may provide a procedure for weighing the legitimate interests of foreign sovereigns, the Executive and Legislative Branches' concerns over foreign affairs and separation of powers, and other relevant factors. In my opinion it remains to be seen whether U.S. courts will perform the complex task of identifying relevant international legal standards and balancing conflicting interests properly, even if they believe that they are capable of such a feat.[13] The Commision on International Application of the United States Antitrust Laws which would be created if S. 432 is enacted will have the opportunity to study and clarify this issue among others. I believe that such a Commission could make a substantial contribution to clarifying the current unsatisfactory state of the law in a number of areas.

What S. 1434 clarifies is that the court may examine a particular act of a foreign sovereign to determine whether it is contrary to international law and may not decline "on the ground of the Federal act of state doctrine" to rule on the merits of a case in which the act is contrary to international law. As I understand S. 1434, a court could decline to exercise jurisdiction on some other ground, such as international comity, if the relevant act of the foreign sovereign was found to be contrary to international law. Moreover, if the act of the foreign sovereign were consistent with international law or if there were no relevant international law, the court could dismiss the lawsuit on the ground of the act of state doctrine or on other grounds.

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[12] Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

[13] The trial judge in the Uranium cartel case made the following statement:

> Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

One of S. 1434's most important contributions to the antitrust field is its finding in section 2 that "the act of state doctrine is conceptually and legally separate and distinct from the defense of foreign sovereign compulsion."

The interplay of the act of state doctrine and the defense of foreign sovereign compulsion is a source of considerable confusion. Although it has been acknowledged in consent decrees and by U.S. Government officials, the defense of foreign sovereign compulsion has been held to be a ground for dismissal in only one litigated case. In that case, Interamerican Refining,[14] plaintiff Interamerican was an American corporation engaged in the business of processing Venezuelan crude oil at its bonded refinery in New Jersey. Defendants Texaco Maracaibo, Inc. and Monsanto Venezuela, Inc. held concessions from the Venezuelan Government for the production of crude oil. They supplied crude oil to defendant Amoco Trading Company, an American company which had contracted to supply crude oil to Interamerican. Texaco and Monsanto were instructed not to

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14/ Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

I have attached to this statement a list of major cases on foreign sovereign compulsion.

ship crude oil to Interamerican by the Venezuelan Ministry of Mines and Hydrocarbons, which regulates oil concessionaires. The reasons behind this order apparently were first, hostility between high Venezuelan Government officials and the two principal stockholders of Interamerican who were Venezuelan nationals and were *personae non gratae* to the Venezuelan Government; and second, the Venezuelan Government's desire to prevent the reexport of its crude oil to "unnatural" markets such as Canada and Europe. When Texaco and Monsanto refused to sell to Amoco for resale to Interamerican, Interamerican sued all three companies for treble damages alleging an illegal boycott. The district court granted defendants' motions for summary judgment because the boycott was compelled by the Venezuelan authorities and "such compulsion is a complete defense to an action under the antitrust laws based on that boycott."[15/] In rejecting plaintiff's contention that compulsion would be a valid defense only if the acts of compulsion were valid under Venezuelan law, the court relied on the act of state doctrine:

> The Act of State doctrine, based upon proper concepts of sovereignty and separation of powers, commands that conduct of foreign policy reside exclusively in the executive. For our courts to look behind the acts of a foreign government would impinge upon and perhaps impede the executive in that function. Whether or not Venezuelan officials acted within their authority and by legitimate procedures is therefore not relevant to the instant case. [16/]

Although in the above quoted passage the court clearly was addressing only the issue of whether it could inquire into the validity under Venezuelan law of Venezuela's compulsion, some courts have confused the inquiry into the validity of the com-

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[15/] 307 F. Supp. at 1296.

[16/] *Id*. at 1299 (citations omitted).

pulsion with the existence of the act of state doctrine, and have erroneously concluded that the act of state doctrine is not applicable if the private defendant's activities were not compelled by the foreign sovereign.[17/]

As Professor Hawk points out:

> This suggested additional requirement [for applicability of the act of state doctrine] of "compulsion" is unsound. The primary if not exclusive focus of the inquiry under the act of state doctrine is whether the particular anticompetitive conduct was authorized to promote the sovereign policy of the foreign government. Further, the policies said to underlie the act of state doctrine would appear to exist whether or not a private firm's activities are "required" or "compelled" in a strong sense. [18/]

S. 1434's finding that the act of state and foreign sovereign compulsion doctrines are "conceptually and legally separate and distinct" and the preservation of the foreign sovereign compulsion defense in section 5 of the bill are helpful clarifications of this increasingly important issue.

In summary, S. 1434 may not have as great an impact in antitrust litigation as in other fields of law because of the absence of international agreement on antitrust standards and jurisdictional reach, and because of the emergence of the "jurisdictional rule of reason." Nevertheless, it represents a recognition of the importance of international law in our legal system and provides the opportunity for our courts to examine and to balance properly on a case by case basis the legitimate interests of foreign governments and antitrust litigants.

[17/] See, e.g., In re Uranium Antitrust Litigation, 617 F.2d 1248, 1254 n. 21 (7th Cir. 1980).

[18/] Hawk, supra, note 8, at 131.

ACT OF STATE CASES UNDER U.S. ANTITRUST LAWS

International Association of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries (OPEC), 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, No. 79-3673 (9th Cir. July 6, 1981) (price-fixing cartel; act of state doctrine bars inquiry into acts of foreign sovereigns in joining and participating in a worldwide oil cartel).

Northrop Corp. v. McDonnell Douglas Corp., 498 F. Supp. 1112 (C.D. Cal. 1980) (attempted monopolization and restraint of trade; act of state bars inquiry into military equipment procurement policies and decisions of foreign sovereigns).

Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (S.D.N.Y. 1979) (violations of §§ 1 and 2 of the Sherman Act, monopolization of tourist facilities in La Romana section of Dominican Republic; act of state no bar where acts were allegedly procured by corruption, government has since repudiated acts).

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (violations of § 2 of the Sherman Act by threats to enforce fraudulently procured foreign patents; act of state no bar to inquiry into validity of foreign patents because issuance of patents is merely a ministerial act).

Industrial Investment Development Corp. v. Mitsui & Co., [1978-1] Trade Cas. ¶ 62,130 (S.D. Tex. 1978), *rev'd*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980) (violations of §§ 1 and 2 of the Sherman Act, conspiracy to exclude plaintiff from market through government denial of a timbercutting license; act of state no bar where neither validity nor legality of Indonesian government's decision to deny license is in issue).

General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979) (conspiracy to restrain trade for short take-off and landing aircraft; act of state bars inquiry into motivation behind foreign sovereigns' procurement of military equipment.)

Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978) (combination and conspiracy to restrain trade and monopolize the manufacture, sale and distribution of golf carts in the U.S.; act of state no bar where case involves sales within the U.S. by export agency of Polish government and possibility of affronting Polish government is remote).

Hunt v. Mobil Oil Corp., 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 904 (1977) (combination and conspiracy to exclude plaintiff by inducing Libyan government to nationalize plaintiff's Libyan oil fields; act of state bars inquiry into validity and motivation behind of Libya's expropriation of plaintiff's oil fields).

Linesman v. World Hockey Association, 439 F. Supp. 1315 (D. Conn. 1977) (hockey association regulation prohibiting persons under the age of 20 from playing professional hockey challenged as an unreasonable restraint of trade; act of state no bar where Canadian Government merely endorsed the regulation and did not compel its adoption).

Timberlane v. Bank of America, N.T. and S.A., 549 F.2d 597 (9th Cir. 1976) (combination and conspiracy to eliminate plaintiff through attachment of plaintiff's Honduran lumber mill; act of state no bar where act involved only the adjudication of Honduran court of a private dispute between private litigants -- not a sovereign act, Honduran government not named as defendant or co-conspirator, and no challenge to Honduran policy and sovereignty).

Cofinco, Inc. v. Angola Coffee Co., A.C. [1975-2] Trade Cas. ¶ 60,456 (S.D.N.Y. 1975) (price-fixing; summary judgment on act of state defense denied where it appears that Angolan government did not set all prices nor did it authorize defendants to trace dealers who "sold short," to keep a blacklist, and to institute arbitration proceedings to enforce prices).

Occidental Petroleum Corp. v. Buttes Gas and Oil Co., 331 F.Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 462 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972) (conspiracy in restraint of trade, conspiracy to monopolize, attempted monopolization to deprive plaintiff of off-shore oil fields by instigation of a boundary dispute between neighboring shiekdoms; act of state bars inquiry into validity of and motivation behind foreign sovereign's claim of sovereignty over adjoining territories).

Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) (conspiracy to restrain trade and to monopolize, attempted monopolization, monopolization alleging that defendants and the Canadian Government's exclusive purchasing agent of vandium ore conspired to eliminate plaintiff from the Canadian market; act of state no bar where purchasing agent of sovereign acted beyond the scope of its authorization).

U.S. v. Sisal Sales Corp., 274 U.S. 268 (1927) (monopolization of sisal market where defendants solicited and secured from the Governments of Mexico and Yucatan discriminatory legislation necessary to perfect their monopoly; act of state no bar where conspiracy implemented in part within the United States resulting in forbidden effects within the United States).

American Banana Corp. v. United Fruit Co., 213 U.S. 347 (1909) (monopolization, defendant instigated seizure and nationalization of plaintiff's banana plantation by the Costa Rican Government; act of state doctrine bars inquiry into the validity and legality of a foreign sovereign's act committed within its territory).

FOREIGN SOVEREIGN COMPULSION CASES

United Nuclear Corp. v. General Atomic Co. [1980-81], Trade Cas. ¶ 63,639 (N.M. S. Ct. 1980), cert. denied, ___ U.S. ___, 101 S. Ct. 1966 (1981), (foreign sovereign compulsion defense should be limited to activities conducted solely within the foreign sovereign's territory).

United States v. Bechtel Corp. [1979-1], Trade Cas. ¶ 62,429 (N.D. Cal. 1979) (consent decree); [1979-1] Trade cas. ¶ 62,430 (N.D. Cal. 1979) (opinion), aff'd, 1981-1 Trade Cas. ¶ 64,111 (9th Cir. 1981) (defendants enjoined from effectuating the terms of "Arab Boycott" within the United States, but not within an Arab League nation).

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (dictum; foreign sovereign compulsion defense requires a showing that the foreign compulsory decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct; no defense where defendant could legally have refused compliance or the sovereign's action rises no higher than mere approval).

Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (dictum; defense may not pose an absolute bar; courts may have discretion to hear the case notwithstanding valid defense).

Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) (sovereign compulsion a valid defense where anticompetitive practices were compelled by foreign sovereign).

Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949 (S.D.N.Y. 1968), aff'd, 407 F.2d 173 (2d Cir.), cert. denied, 395 U.S. 922 (1969) (foreign sovereign compulsion defense does not necessarily immunize defendants from prosecution or liability for acts done in United States commerce).

United States v. Watchmakers of Switzerland Information Center, Inc. [1963] Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), modified, [1965] Trade Cas. ¶ 71,352 (S.D.N.Y. 1965) (foreign sovereign compulsion not a defense where the sovereign merely approves defendant's acts).

Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) (foreign sovereign compulsion no defense where acts were neither compelled nor authorized by the sovereign government).

PREPARED STATEMENT OF STANLEY J. MARCUSS

Thank you, Mr. Chairman, for your invitation to present my views on S. 1434 to the Criminal Law Subcommittee. When I was a government official, I was often called upon to pretend I had answers to every question. Today, with your permission, I will assert my privilege as a private citizen to raise questions instead and suggest some additional approaches to the act of state doctrine that the Subcommittee might wish to consider.

S. 1434 would preclude courts in the United States from declining on the ground of the act of state doctrine to make a determination on the merits in any case in which the act of state is contrary to international law. The foreign sovereign compulsion defense, however, would be preserved.

In its simplest formulation, the act of state doctrine provides that U.S. courts will not examine the validity of the acts of a foreign government within its own territory. As applied, it has the occasional effect of precluding an aggrieved party from securing redress for harm it believes to have been caused by an act of a foreign government, even when that act is allegedly illegal under international law.

In your law review article,* Mr. Chairman, you eloquently described the many - and occasionally inconsistent - considerations that have guided the evolution of the act of state doctrine over the years. They include respect for the sovereignty of foreign nations, notions of territorial limits on jurisdiction, concepts of international comity, deference to the Executive branch in the conduct of foreign relations, the absence of clear standards of international law and judicial reluctance to inquire into politically-charged questions. In that article, you also correctly pointed out that the courts have applied the doctrine inconsistently and unpredictably.

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* Mathias, "Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform," 12 L. Pol. Int'l. Bus. 368 (1980) [hereinafter "Mathias."]

Mr. Chairman, by introducing this legislation and holding these hearings, you are doing the international legal and business communities a great service, for you are helping to focus attention on the need for greater clarity and consistency in the concept and application of the act of state doctrine. I urge you to continue the effort.

The principal point I wish to make with respect to your proposal is that I think it helps point out the need for the Congress to give careful attention to all aspects of the act of state doctrine before it adopts a solution. Your proposal is a catalyst for that exercise, but, in my view, in its present form it raises more questions than it answers and, if enacted, might create more uncertainty than does the existing state of the law, imperfect as it might be.

The act of state doctrine attempts to propagate a stable system of international relations by encouraging the United States government to "speak with one voice" and by discouraging ostensibly disruptive inquiries into the motivations of sovereign states.

By precluding judicial resolution of some disputes, however, the act of state doctrine has sometimes produced results that seem to be unfair. In the seminal case of _Underhill v. Hernandez_* itself, the plaintiff was deprived of an opportunity to recover for personal indignities that he had suffered at the hands of a revolutionary government. Lawyers are seldom content to accept doctrines of law that produce such seeming unfairness. Concern over such unfairness appears to be the principal source of the current interest in modifying the act of state doctrine.

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* 168 U.S. 250 (1897).

For individuals and organizations involved in international business transactions, however, the act of state doctrine has one clear positive attribute: it is a relatively settled principle of law despite the uncertainties in its rationale and application. It may be true that the precise rationale that a court will rely upon in applying the doctrine is difficult to predict, and it may also be true that some courts, more than others, will apply it in a wooden manner. Nevertheless, compared to the principles and rules of international law on many questions, the basic contours of the act of state doctrine are a model of clarity.

The denial of judicial resolutions of individual cases is not the only form of unfairness that we must guard against. The creation of new doubts and uncertainties through legislation that deals with only one aspect of the problem would also be unfair to those who must carry on their daily activities without sufficient legal guidance. Accordingly, I believe that this Subcommittee should take legislative action on the act of state doctrine only at such time as it is satisified that it is replacing that doctrine with a new legal regime that is at least equally certain and predictable.

While the objectives of S. 1434 are admirable, I do not believe the Subcommittee should conclude that the bill is ready for enactment in its present form. Unlike the Foreign Sovereign Immunities Act of 1976, which essentially codified and regularized the doctrine of foreign sovereign immunity, S. 1434 takes the far more radical approach of totally abolishing the act of state doctrine in an entire class of cases and remitting litigants to a wholly different and uncertain body of rules: those of international law. If an example is needed of just how uncertain those rules can be, one need look no further than Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), in which the Supreme Court properly concluded that an insufficient degree of consensus existed on the international law of expropriation to permit a conclusion that there was any reasonably-settled rule of international law on the subject. The Court reached this conclusion despite an elaborate inquiry by the court below that came to the opposite view. Banco Nacional de Cuba v. Sabbatino, 307 F. 2d 845, 864-869 (2d Cir. 1962). If two of our most elite courts could come to such radically different conclusions as to the very existence of a norm of international law on such a relatively straightforward subject as expropriation, businessmen and others who require certainty for their planning can hardly be expected to do better.

The uncertainty that would be created by S. 1434 is deeply troubling. U.S. corporations doing business abroad would be exposed to potential double liability for the unlawful acts of a foreign government. So, too, would individual American citizens who were forced by a foreign government to commit acts that harmed a third party. For

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* Hawk, "Act of State Doctrine, Noerr-Pennington Abroad and Foreign Government Compulsion Defense," 47 A.B.A. Antitrust L.J. 987, 1002-1003 (1978)

neither of them would the foreign sovereign compulsion defense be a sufficient alternative.

Foreign sovereign compulsion is a relatively narrow doctrine of antitrust law. Under that doctrine, if a party's allegedly anticompetitive actions are carried out within the jurisdiction and pursuant to the direction of a foreign government, that party will not be held liable for violations of United States antitrust laws. Moreover, as one commentator has noted,* the considerations underlying the foreign sovereign compulsion defense are quite distinct from those on which the act of state doctrine is based.

First, the foreign sovereign compulsion defense reflects judicial concern over the unfairness of holding private parties liable for actions that they could not avoid taking. Second, because the purpose of the antitrust laws is to promote commerce, the foreign sovereign compulsion defense excuses conduct that would otherwise be considered anticompetitive. As a matter of antitrust logic, therefore, there is little utility in imposing liability for actions taken under duress, since resistance would only impede commerce further.

Under S. 1434, individual U.S. citizens and corporations who are subject to foreign law would be placed in the untenable position of deciding whether the requirements of a foreign government are consistent with international law. If, in the eyes of a U.S. court viewing the matter retrospectively, they have reached an incorrect conclusion, they will be exposed to the risk of liability for actions in accordance with what they believed in good faith to be the lawful act of a foreign government. It is manifestly unfair to require U.S. citizens to assess at their peril the legality of a foreign government's actions under the limited jurisprudence of international law. And it is hard to see how placing them between the proverbial rock and hard place is an improvement over the present system.

Limiting the act of state doctrine as proposed in the bill would transform United States corporations into insurers of parties injured by the unlawful acts of foreign governments. However devoutly we may wish to subject foreign governments to the rule of law, caution is in order where the costs of their unlawful acts would be transferred to American citizens.

Let me illustrate my concerns with some hypothetical examples:

1. Adams Corporation, a U.S company, licenses its secret manufacturing process to a foreign subsidiary of Brown Corporation, also a U.S. company. As part of the licensing agreement, Brown promises to protect the secrecy of the process. The foreign country where Brown's subsidiary is doing business then enacts a law requiring all foreign corporations doing business in that country to transform themselves into joint ventures with indigenous companies so that domestic expertise and infrastructure can be developed. In entering into such a joint venture, the Brown Corporation discloses the manufacturing process to the native company after concluding that it is required to do so under local law. The new law does not provide compensation for the forced disclosure of trade secrets, arguably a violation of international law as a taking without just compensation.

In the United States, Adams Corporation then sues Brown Corporation for violation of the licensing agreement, and seeks damages. Now, as I understand it, under S. 1434, neither the act of state doctrine nor the foreign sovereign compulsion defense would be available to Brown Corporation even though it had acted in accordance with the law of the foreign country. Although there was compulsion, since this is not an antitrust case, the foreign sovereign compulsion defense in not available. The Brown Corporation in that circumstance faces serious potential liability.

Cryon Corporation hires thirty skilled American workers in the United States to travel to a foreign country where it is building a plant. These workers have been assured that they and their families will be housed in luxurious, American-style communities built by the company. While the workers are present in the foreign country, a group of xenophobes seizes power and decrees that all aliens resident within the country shall live only in designated, highly undesirable areas of each city. That decree arguably violates international law because it discriminates against aliens without a reasonable basis.

The American workers live in the designated areas until the completion of their work, but, upon their return to the United States, they sue their employer for damages, claiming that their children have suffered psychological harm from "the company's failure to keep its promise." If S. 1434 were law, neither the act of state doctrine nor foreign sovereign compulsion doctrine would provide a defense for the company.

3. Dahlia Corporation contracts to buy heating oil from a U.S. oil company. The oil company arranges for the

oil to be shipped from a Middle Eastern country. As the oil is about to leave port, the foreign government attaches it. The oil company is told privately by government officials that although the official reason for the seizure is the lack of a proper stamp on an export document, this problem can be overcome by making a "gift reflecting your esteem" to a certain nephew of the king. The oil company refuses to make such a payment, and the foreign government keeps the oil. The taking of the oil company's property arguably violates international law because it is not for a public purpose. Restatement of Foreign Relations Law 2d §185(a).

Dahlia sues for return of the contract price, most of which the oil company has already turned over to the foreign government. Under S. 1434, neither act of state nor foreign sovereign compulsion would apply.

4. Greeley Bank has a branch in a foreign country. The government of that country expropriates the assets of only American banks and pays no compensation. Such a discriminatory policy would violate international law under the Second Circuit's analysis in Sabbatino, supra. In compliance with the expropriation decree, Greeley's branch pays over the deposits in its possession to the foreign government. One of that branch's depositors then seeks payment of his deposits from Greeley Bank in the United States. When he is refused, he sues. Under S. 1434, Greeley Bank faces a strong possibility of having to pay out the same deposits twice.

5. Mr. Hardy, a United States citizen, has a contract with the government of a foreign country to build a sewage treatment plant for the capital city. While he is in the foreign country carrying out the contract, a coup d'etat

takes place, and he is prevented from leaving the country on the personal orders of the Minister of Internal Affairs. After months of house arrest, during which he is prohibited from contacting the U.S. embassy, Mr. Hardy finally obtains permission to return to the United States, and does so. The arrest arguably is in violation of international law because Mr. Hardy was denied any opportunity to communicate with his government. *See* Restatement of Foreign Relations Law 2d §179(2)(c).

Some months later, massive reserves of oil are discovered in the foreign country. The former Minister of Internal Affairs becomes president of a newly formed oil company in which the foreign government holds a 25% interest, sufficient to give it practical control. The former minister is sent to negotiate oil sales to the United States at a price significantly below the world market price. Soon after his arrival, he is served with a summons notifying him that Mr. Hardy has filed suit over his unlawful detention and the termination of the contract to complete the sewage plant. If S. 1434 were enacted, the Minister of Petroleum would be required to stand trial in a U.S. court, to the likely jeopardy of the U.S. national interest in the oil negotiations.

6. Mr. Jackson is a young tourist in Central America who has run out of money and is desperate. He sells a bag, apparently containing marijuana, to another young United States citizen. Moments later, he is arrested by the local police for trafficking in drugs. He is held in jail for two years without charges or trial -- rights to which he is entitled under international law. *See* Restatement of Foreign Relations Law 2d §179(2)(a) and (b). In fact, the

bag that he sold contained only oregano, but the buyer, who was an agent of the Drug Enforcement Administration, told the local police in good faith that it was marijuana. Some months later, Mr. Jackson learns that the D.E.A. agent has returned to the United States. He sues him for causing his unlawful imprisonment by foreign authorities. S. 1434 would preclude the agent's reliance on the act of state doctrine.

7. The Lindsay Company, an American corporation, and a French corporation both maintain offices in a communist country for purposes of carrying out contracts to deliver heavy construction equipment to state authorities. An official of the French corporation is told by a source he considers reliable that one of the Lindsay Company's board members is an emigre from the communist country and has strong ties to Zionist organizations. This information is incorrect. The French executive mentions the matter to government officials who thereupon refuse to accept delivery of, and pay for, any more Lindsay equipment. No reason is given by the foreign government for its action; but it is arguably based on a form of religious discrimination and, therefore, may violate the Universal Declaration of Human Rights. Eventually, the Lindsay Company sues the French company in the United States for tortious interference with its business relations. Under S. 1434, the French company would be forced to stand trial in the United States for the actions of a foreign government.

In each of these situations, because of S. 1434, a person or corporation would be required to stand trial in a U.S. court because of harm caused by the wrongful act of a foreign government. It may very well be that in some of these situations, doctrines of law other than the act of state doctrine would successfully avert an unfair imposition of liability. Yet the question remains, why should we create new problems such as these in an effort to correct existing ones.

This is not to state that there is no room for legislation on this subject. There is no question that the act of state doctrine has been applied in a number of instances where it appears to have permitted a foreign government unfairly to take advantage of its own wrongdoing. But its wholesale abolition is not the best way to proceed. Congress could take other approaches to improving the law in this area while minimizing potential new problems. Let me suggest two possibilities.

One would be to follow in the footsteps of the Foreign Sovereign Immunities Act and codify the act of state doctrine in an appropriate formulation. By codifying the doctrine, Congress could eliminate some of the conflicting analysis now visible in the cases in which the doctrine has been invoked. This would reduce the legal unknowns in the conduct of international business. Through codification, Congress could decide whether it wished to require the courts to balance certain factors in deciding whether to apply the doctrine rather than mechanically withdrawing from inquiry the moment that an act of state is alleged. Among the factors that might be weighed is the degree of consensus that exists on a particular matter of international law. This balancing approach is seen by some as the heart of the Supreme Court's decision in Sabbatino. By requiring consideration of the degree of clarity on a relevant matter of international law, Congress would promote the growth of international rules and principles, while reassuring parties that where uncertainty prevails, they will not suffer.

With codification, Congress could also determine the degree to which the doctrine should serve as a device for preserving the prerogatives of the Executive Branch in the conduct of foreign relations. A review of the so-called Bernstein exception is certainly in order, and Congress could specify the circumstances and the manner in which it could be invoked.

Congress might also consider whether it is desirable and feasible to deal specifically with situations where it is alleged that the defendant generated or encouraged the act of state that gave rise to the plaintiff's harm. It could also deal with situations where an instrumentality of the foreign government, or the foreign government itself, seeks to take advantage of its own allegedly illegal action.

Congress might also specify the criteria that should be applied by the courts in examining whether a particular act is an act of state. Congress could decide the degree to which it wished the courts to pursue the approach recently articulated by United States Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala, 630 F. 2d 876 (2nd Cir. 1980) and provide that acts "wholly unratified" by foreign governments and contrary to the law in those countries do not constitute acts of state.

As an alternative to codifying the act of state doctrine, Congress could consider expansion and codification of the foreign sovereign compulsion defense as a possible replacement. At a minimum, this would require an inquiry into whether that defense should be broadened to absolve organizations or individuals from any liability, not just antitrust liability, for acts or omissions resulting from coercion by a foreign government. The inquiry would involve an examination of the degree of coercion that Congress considered sufficient for this purpose and whether the defense should be available only for acts or omissions taking place outside the United States.

Reliance on foreign sovereign compulsion as a replacement for the act of state doctrine would undoubtedly call for difficult inquiries into the decision-making process in foreign countries, raising serious evidentiary problems in proving that a sufficient degree of coercion exists. And expansion of the foreign sovereign compulsion defense would do nothing to allay fears that may exist about preserving the separation of powers and the ability of the executive branch to conduct foreign relations effectively. Nevertheless, Congressional examination of the foreign sovereign compulsion defense could proceed from familiar territory and build at its edge. This approach would also help minimize uncertainty on the part of the business community.

There may very well be other sensible approaches. While I have no firm recommendation at present on how to proceed, I do not believe that the time is yet ripe for the enactment of legislation along the lines of S. 1434. I would strongly suggest, however, that if the problem with the act of state doctrine is inconsistency in its application and rationale as well as occasional unfairness in its application, then the cure is not to adopt legislation that would perpetuate those problems and shift them to other shoulders. The imperfections that we know may well be preferable to those that would be created.

PREPARED STATEMENT OF G. HENRY M. SCHULER

It is a privilege to appear before the Senate Judiciary Committee to support efforts to limit application of the act-of-state doctrine. As the Senators are aware from the description of my background, I encountered this anachronistic bit of escapism in the 1970's in connection with my responsibilities as principal representative of Nelson Bunker Hunt in negotiations with Libya related to his half interest in the 10 billion barrel Sarir Field. Therefore, this testimony represents my personal experience and views rather than those of Deloitte Haskins & Sells or any client.

Let me establish also at the outset, that I am here today not because I am looking back and "crying over spilled milk" but rather because that experience has taught me to be wary of the pitfalls which the act-of-state doctrine poses for the future, especially for the still perilous energy situation which will prevail at least until the end of this century. In my judgment, application of the act-of-state doctrine to regimes personified by the likes of Muammar Qaddafi, Idi Amin, Jean Claude Bokassa and any other tyrants who enthusiastically operate outside the accepted principles of international law, threatens our overlapping energy and national security interests in at least five ways:

- Firstly, inability to obtain legal recourse for nationalizations which are politically motivated and contrary to international law creates pressures for efforts to seek redress through economic and political confrontation. In effect, the act-of-state doctrine ties the hands of the Executive Branch and thereby amounts to the very sort of violation of separation of powers which it is designed in part to avoid.
- Secondly, awareness that there is no legal recourse in the event of nationalization forces oil companies to protect

their assets by accepting intolerable fiscal and political conditions which do not serve the interests of oil consumers or the United States Government.

- Thirdly, inability to assert one's legal rights even in American courts helps to discourage companies from exploring aggressively for oil in Less Developed Countries at the very time when an intensive search is required to save those countries from bankruptcy and to reduce demand pressure on Middle Eastern supplies. In other words, companies can only protect their assets by avoiding any exposure of them in politically unstable LDC's.
- Fourthly, because there is neither a realistic international forum nor uncontroverted principles of law, self-denial of American jurisdiction has led to a total break-down of the legal process thereby destroying all semblance of contractual stability in international oil relationships. As a result, consumers are at the mercy of the most avaricious producers during supply shortages because they cannot negotiate enforceable long-term contracts during so-called supply "gluts."
- Fifthly, and most importantly, each unpunished exercise of political pressure through illegal actions against American commercial interests, encourages the offending government, and those who are tempted to emulate it, to tighten the screw another notch. I very much fear that this situation will lead inexorably to an unnecessary war over international energy.

Having explained the unintended implications of the act-of-state doctrine as I see them, it is now encumbant upon me to provide the real life experience which has led me to such dire conclusions. The story is long and complicated; but I shall attempt to be reasonably brief and hope that any omissions and over-simplifications can be covered in the question period.

The first unabashedly political nationalization took place on December 7, 1971 when Colonel Qaddafi nationalized BP's half interest in the Sarir Field in order to punish Her Majesty's Government for permitting the Shah of Iran to occupy Abu Musa and the Tumbs, three strategically placed islands in the Persian/Arabian Gulf, which were claimed by several Arab Emirates just then ending a protectorate relationship with the British Government. Lest anyone doubt the political purpose of this nationalization, Qaddafi named the Libyan successor to BP the "Arabian Gulf Exploration Company," thereby proclaiming that the Gulf was no longer Persian.

Her Majesty's Government promptly protested, officially advising the Libyan government that:

> "Nationalization measures which are arbitrary or discriminatory or which are motivated by considerations of a political nature unrelated are, by a reference to those principles, illegal and invalid."

(A full description of the BP nationalization is contained in that company's arbitration memorial submitted as Attachment 1). At the same time, BP took legal action to assert its rights, announcing its intention to institute litigation against any purchaser of its putative share of Sarir oil and instituting arbitration proceedings under the unequivocal provision of its concession agreement.

The Libyans rejected the diplomatic protest, refused to accept arbitration as a derogation of sovereignty and urged other Arab states to follow Libya's example in using "the oil weapon." A speech by the Libyan Ambassador to the Arab Economic and Social Council at the time is especially note-worthy because it was one of the first threats of a policy which found many Arab adherents in 1973 and which hangs even more like a sword of Damocles over the consuming world today,

> "We have the oil weapon and the financial weapon and we should use both. The language of our era is force, and we have the economic resources to enable us to win the battle."

Despite this bravado, it was not so clear in 1971 that oil producers held the "whip hand." Qaddafi was still probing the limits of his power, the extent of his influence on other Arab states and the vulnerability or resolve of the Western world. Many responsible Libyans and other Arabs expected that a firm Western response would force Qaddafi to modify his policies or lose power, thereby discrediting his confrontation policies and politics.

For a while, this hope looked realistic because Bunker Hunt resisted Libyan threats and enticements to provide color of title for what he viewed as the "stolen oil" of his former partner. Potential purchasers with less scruples were also scarce, for, as was to become the case a decade later, late 1971 was one of those recurring periods of temporary oversupply which arise as the consuming world licks its wounds from the last price cataclysm. In a slack market, there was little incentive to risk BP's litigation so only one cargo was sold at the end of 1971 to an Italian refiner thereby triggering a suit for a writ of attachment in a Sicilian court. The Libyans were forced to turn to the Soviet Bloc, which was willing to provide a minimal market, the protests of HMG notwithstanding. Nevertheless, bartering Libya's premium crude oil for shoddy and exorbitantly valued goods was no substitute for selling it for hard currency. At one point, Qaddafi even railed against the "godless Rumanian communists" who had welshed on a housing deal.

Unfortunately, however, the oil market began to tighten in its inexorably cyclical fashion so the pressures on Hunt escalated. Hunt's operating personnel were expelled from Libya, his customers were forced to incur demurrage as Soviet tankers were loaded out of turn, he was denied access to the field and his share of production was arbitrarily curtailed...all with a view to forcing Hunt to provide color of title in order to market the expropriated oil. Then, in the Fall of 1972, the Libyans added a new demand by selecting Hunt as the "lead-off-batter" in their campaign for "participation", a euphemism for expropriation agreed to "voluntarily" at the muzzle of a gun. It was only the latest example of Qaddafi's successful "salami tactics" whereby the most vulnerable company - now clearly Hunt - was forced to accept onerous terms which would then become an unavoidable precedent for the other companies operating in Libya and, ultimately, around the world. In this instance, the Libyans demanded that Hunt assign to the government a 51 percent interest in the concession, for which Hunt would receive only the depreciated value of the hardware, with no compensation for even the discounted value of the loss of future earnings, let alone for the loss of some 2.5 billion barrels of oil.

All of this may sound like a lot of commercial bickering or haggling in the souk, but don't be deceived. It was politically motivated from start to finish. Qaddafi's act of political protest through expropriation of BP would have backfired on him at home and within the region if he had been seen to be unable to market the fruits of his expropriation. Similarly, he was insisting upon immediate 51 percent "participation" at net book value in order to upstage Yamani and the Saudis who had just agreed to a 25 percent level under a compensation formula more generous to the companies. If Qaddafi could employ his divide-and-conquer scheme to impose a more onerous deal in Libya, he would prove to the masses of the Gulf that revolutionary socialism was more successful than feudal capitalism, thereby contributing to subversion of the governments of Saudi Arabia, Kuwait and the Emirates.

The Libyan representatives repeatedly insisted that failure to accede to what they characterized as the Revolutionary Command Council's "political demands" would result in total expropriation. The nationalization of BP had given substance to that threat, but a few of us assumed that it had also focused the attention of the United States and other consuming governments on the need to nip-in-the-bud calls for utilization of the "oil weapon." Being literally and figuratively under the gun of Qaddafi's principal deputy, Major Abdul Salum Jallud, I was personally convinced that Western governments and companies would do whatever was necessary to defang this political wolf operating under the commercial fleece of a sheep.* Therefore, I came to be viewed - in the words of John J. McCloy's testimony to the Senate Foreign Relations Committee - as the most "hard nosed" industry negotiator during the early 1970's. My urging of resolute resistance to Libya's demands did not prevail in industry circles because my colleagues were convinced that companies which were expropriated would have recourse neither to the American State Department - which lacked the political will to intervene - nor to American courts - which would decline involvement under the act-of-state doctrine. As a result, the oil industry and consuming governments were forced to "flinch," and the Libyans - and their latter day emulators - have not yet had cause to look back.

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*NOTE: I should emphasize that these were my personal views and did not necessarily reflect Bunker Hunts' own assessment of the situation. In other words he may have authorized the same negotiating stance for somewhat different reasons.

Hunt attempted to defuse the situation and stave-off nationalization by availing itself of the legal remedies provided in the arbitration provisions of the Concession Agreement. (See Attachment 2 for the catalogue of Hunt grievances contained in the request for arbitration.) Although this bought a few more months of production, it did not ultimately deter Qaddafi from using nationalization to make a grand political gesture just as soon as the financial risks of such a step could be minimized. On May 2, 1973, a subsidiary of Coastal States, an American refiner, entered into an agreement to purchase a sizeable quantity of Sarir oil, and, on May 3rd, the Libyan Minister of Petroleum told an American oil executive that Hunt's days were numbered. Then, on May 21st, a small California refiner posted the prerequisite performance bond to purchase additional quantities of Sarir oil destined for Coastal States. Confident that they could now sell Sarir oil even in the United States, the Libyans advised Hunt on May 24th that his customers could no longer "lift" Sarir oil. Expropriation existed in fact although it would not exist in law until it served Qaddafi's political ends.

That occurred on June 11, 1973, the third anniversary of the expulsion of American forces from Wheelus Air Force Base in Tripoli. Flanked by Idi Amin and Anwar Sadat (then still an ally of Libya), Qaddafi launched into a typical vitriolic tour d'horizon of political and oil objectives. Appendix 3 contains the full text from a radio intercept, but I cite herein the relevant portion for convenience,

"The United States, which has suffered defeats everywhere has not yet been taught the final lesson, especially when we see it being quarrelsome in the Arab world and siding unreservedly with Israel. The United States, which believes it dominates the world with its oil monopolies, its aggressive military bases and fleets, and which continues to provoke the peoples fighting for their freedom and independence - we proclaim loudly that this United States needs to be given a big, hard blow in the Arab area on its cold, insolent face.

US policy, brothers, is going to lead to a catastrophe for US interests, in the Arab area in particular.

The time has come for the Arab peoples to confront the United States, the time has come for the US interests to be threatened earnestly and seriously in the Arab area regardless of the cost. The haughtiness and imperialist arrogance of the USA manifests itself in a number of challenges to the Arab nation. They are reflected in the fact that it challenges us with aircraft carriers and with spy planes while we are building our country and seeking to defend our freedom. The United States defies us in this resolve. Every now and then it threatens Libyan regional waters, this in addition to all the other acts of insolent defiance of this fierce imperialism. The United States still scorns the Arab nation and its rights. It is continually giving Israel the most modern arms to enable it to humiliate the Arab nation, to defy its will and to remain, against all justice, in the occupied territory. US (?arrogance) is now, moreover manifested in the attitude of the oil companies, which do not wish to respond and submit to the will of the people in whom sovereignty is vested - the people, the owners of the wealth, the owners of the oil who enjoy sovereign rights over the oil wealth and have the final and last say. In our negotiations with the American monopoly companies, we are facing US arrogance and the imperialist spirit which does not heed either right or logic. However, the time may come - if it has not already come - for the serious and dangerous confrontation to take

> place, a confrontation the cost of which we must be prepared to bear, with the oil companies and the whole of US imperialism, /applause/.
>
> On this occasion, the Revolution Command Council of the Libyan Arab Republic has decided to Nationalize the American oil company Bunker Hunt /applause and cheers/."

The next day, the official Libyan radio promulgated the full text of the nationalization law accompanied by more crowing about punishing the United States including a clear declaration of purpose (See Attachment 4),

> "The United States has been giving modern weapons and equipment to the Zionist gangs so as to kill the Arab people and continue occupying their land....
>
> Moreover, the United States which obtains its oil supplies from the Arab land, has supported and continues to support all the plots being concocted against Arab rights and Arab destiny.... The United States was behind the plot to liquidate the Palestinian Resistance and to eliminate the Palestinian Arab people. The United States has been supporting every agent reactionary regime. It gives such regimes arms and equipment to terrorize Arab revolutionary movements.
>
> Moreover, planes sometimes fly near Libyan skies, and aircraft carriers at other times roam the seas near the Libyan shores....
>
> In view of this American impudence and the continued disregard for Arab rights and Arab destinies it was necessary to strike a blow against US policy. Therefore, it was only right that on the anniversary of the evacuation of the US bases the brother colonel, in the name of its people and Arab rights should declare the nationalization of the US Bunker Hunt oil company....

> The nationalization of the American company is only a warning to the oil companies to respond to the demands of the Libyan Arab Republic.... It is also a warning to the United States to end its recklessness and hostility to the Arab nation. The time has come for this great nation to use its resources in the decisive battle which it is waging against Zionism and imperialism...."

Unfortunately, the State Department reacted too quickly before it had studied the surrounding circumstances. Reaching into its endless files dealing with purportedly legal nationalizations, it dispatched the standard pap about "prompt, adequate and effective" compensation to the Libyan government on June 14th. Only later did it recognize the clearly illegal character of this nationalization. On July 5th, it sent an official protest which read in relevant part,

> "The United States Government has now had the opportunity to review the public statement by the Chairman of the Revolutionary Command Council on June 11, 1973, and the official commentary accompanying Law No. 42 of the same date. It is clear from those pronouncements that the reasons for the action of the Government of the Libyan Arab Republic against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya. Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.
>
> In these circumstances, the United States Government must protest the action in violation of international law

> against the Nelson Bunker Hunt Oil Company, and it calls upon the Government of the Libyan Arab Republic to take the necessary steps to rectify this situation and to discharge its obligations under international law with respect to the Nelson Bunker Hunt Oil Company."

Prior to dispatching this official protest, the Department of State virtually insisted that Hunt avail itself of all legal remedies available to it as a private party. In fact, State released the note only after Hunt ran, on July 3, 1973, an advertisement in a large number of American and foreign newspapers warning would-be purchasers of its intention to enforce its legal rights (See Attachment 5 for text of this advertisement). Thereafter, Hunt joined BP, its one-time joint venturer, in some 20 lawsuits in Italy, Greece and Brazil to recover Sarir oil or its proceeds. On August 8, 1973, Hunt and BP also brought suit against the appropriate subsidiaries of Coastal States in the District Court of Harris County, Texas. Suffice it to note at this point that the facts in this case were essentially undisputed. Moreover, the presiding judge opined at the end of the pre-trial hearing that

> "I am impressed very much with the fact that Libya has done something that is very wrong, very wrong indeed.
>
> They have granted a right, and [have] arbitrarily without reason taken this right away from individuals who have invested a great deal of money in it.
>
> Now, this offends the sense of justice of this Court, and I think it has been adequately proven in this Court that this wrong was arbitrarily, capricious[ly] and maliciously committed."

Nonetheless, Coastal States promptly interposed the act-of-state doctrine as a barrier to the Texas Court's consideration of the legality of Qaddafi's politically motivated expropriation and even counterclaimed against Hunt and BP for tortious interference in Coastal's relationship with the expropriators. We shall deal with the outcome of this case later, but first let's consider the impact of this sophistry on events in Libya.

The other companies still operating in Libya were reinforced in their skepticism about the efficacy of American judicial protection against an illegal nationalization and even had reason to wonder if the act-of-state doctrine might operate to turn the aggrieved parties into offending parties. In any event, the crude market was much tighter since long-standing US limitations on oil imports had been eliminated in April. On August 11th, 3 days after Coastal States raised the act-of-state doctrine in Houston, Occidental acquiesced in a 51% participation deal in Tripoli and thereby destroyed the more reasonable arrangement which had been carefully crafted by the moderates in the Gulf. Then, Continental Marathon and Amerada followed-suit 5 days later. Convinced of his invincibility, Qaddafi nationalized 51% of the remaining companies (Exxon, Mobil, Texaco, Socal, Arco, Grace and Gelsenberg) on September 1, 1973 a date chosen for its political significance as the fourth anniversary of the Libyan revolution or coup d'etat.

Once again, the American companies threatened litigation against buyers of their oil and the State Department protested that the expropriation was "invalid under international law" (See Attachment 7 for full text of diplomatic vote.) But, by this time it was clear, that such steps were likely to be ineffective in the face of the act-of-state doctrine. Therefore, other unusual and controversial forms of pressure were invoked. On September 4, 1973, President Nixon publicly threatened a retaliatory boycott, saying

> "Oil without a market, as Mr. Mossadegh learned many, many years ago, doesn't do a country much good.

We and Europe are the market."

(See Attachment 7 for various press accounts.) The fact that it was rather late in the day for empty threats is irrelevant to the point that the lack of legal recourse had contributed to political and economic confrontation. Another unusual development occasioned by frustration over the nationalization was the active role of the Department of State in warning oil-starved American refineries and utilities to avoid purchasing the disputed oil (See Attachment 8 for State's description of these controversial steps).

Meanwhile, the ponderous arbitration proceedings set in motion by BP almost 2 years earlier were grinding toward one of those pyrrhic victories with which international law tribunals are all too frequently associated. Under the Concession Agreement, binding arbitration was self-executing if one of the parties refused to participate. Therefore, on October 10, 1973, a Swedish jurist appointed by the Pakistani President of the World Court rendered an award. He ruled that the expropriation was a violation of international law, saying,

> "the taking by the Respondent of the property, rights and interests of the Claimant clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."

(See pages 51 and 52 of the Arbitration Award included in Attachment 9). Having made such an unequivocal finding, the learned arbitrator then proceeded to render it legally ineffective by resorting to "the better part of valor." Because he could not physically reinstate BP to its Libyan concession, he ruled that it continued in effect only to the extent that it established the tribunal's jurisdiction and provided the standard for measuring damages which were claimed to be in excess of half a billion dollars even at then prevailing world oil prices. It was a splendid but unenforceable opinion because it would not assist BP to claim the actual oil in the courts of the world, and, absent that remedy, there was little to compel the Libyans to hand-over some $500 million.

Now there was nothing to hold the Libyans back from combining oil demands and political blackmail. In the aftermath of the Yom Kippur War, they repeatedly led the other Arab states in raising prices unilaterally, in ignoring binding contracts wrung from the companies only a few months earlier, and in imposing the embargo long after the other OAPEC members had relented. By this time, they had nothing to fear in expropriating companies as a political gesture. Thus, on the very day in February, 1974 when Secretary Kissinger convened the first international oil conference of OECD foreign ministers in an effort to coordinate consumer response to producer coercion, Qaddafi announced the nationalization of the remaining 49 percent of Texaco and Socal. It was his way of establishing unequivocally that the most radical producers would henceforth exercise the "whip hand" because consumers were too puny to respond.

Qaddafi's message was not lost. The conservative states of the Gulf abrogated their original Participation Agreements and forced the companies to sign over their entire concessions. Iraq and Nigeria followed the Libyan lead in expropriating foreign companies for openly political reasons. As for the remaining companies in Libya, they still hang on for dear life, ignoring the request of the State Department that they withdraw their potentially hostage personnel in order to give the United States Government a freer hand to combat Libyan terrorism and subversion. Last, but not least, the Libyan Government's politically motivated nationalization was formally legitimized in 1975 when Hunt reluctantly - if realistically - accepted a

$17 million pittance for his Libyan assets. Before we condemn these companies and governments for succumbing to Qaddafi's pressure, we would do well to continue the sad tale of the suit by Hunt and BP against Coastal States.

The course of the litigation is a matter of public record and I will not pretend to present it in legal fashion; however, it is accurate to characterize it as having foundered on the act of state doctrine. For starters, BP, fearful of Coastal States' counter-claim, withdrew from the suit and is understood to have entered into an informal arrangement which led to dropping that counter-claim. Hunt, determined that justice be done, pursued the litigation but was thwarted at every step of the way by repeated court refusals to consider the illegality of the expropriation even though the executive branch of our government and an appointee of the World Court had expressly found it a violation of international law. The Texas Supreme Court affirmed the adverse decision of the trial judge and the appellate court, and the United States Supreme Court refused to grant certiorari in 1979.

Then to add insult to injury, Coastal States, encouraged by the perversely granted immunity of the act-of-state doctrine, proceeded to sue Hunt for $75 million for allegedly conspiring with BP in restraint of trade. It was hoped that disregard for the illegality of the expropriation could be turned into an offensive weapon as well as a defensive weapon, thereby converting the aggrieved parties into offending parties simply because they sought to assert their legal rights in an American court. Several months ago, a Federal District Judge refused to send that claim to a jury in Houston, but his ruling may be appealed.*

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*NOTE: The official record of the litigation involving Hunt and Coastal States is contained in attachment 10 for convenience.

In closing, I would reiterate that I have attempted to discuss the international energy consequences of the act of state doctrine and have identified a specific example solely to prove that my concerns are not hypothetical. I would not attempt to pass legal judgment, but neither would I hesitate to condemn uncritical application of an antiquated doctrine in a manner which flies in the face of our national interests in perilous times. For these reasons, I strongly commend the Committee for providing a focus on a doctrine whose time has long since passed.

Thank you for the opportunity to submit this statement.

Deloitte
Haskins Sells

Washington National Affairs
Suite 460
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 862-3690
TWX 64258

Senator Charles McC. Mathias, Jr.
United States Senator
358 Russell Senate Office Building
Washington, D.C. 20510

September 15, 1981

Dear Senator Mathias:

It was a privilege to participate in the hearings which you held yesterday on the act of state doctrine. Somehow, I believe problems take on a special clarity and urgency when placed in the context of the growing Libyan-American confrontation.

I would like to take advantage of your willingness to keep the record open to rebut one point made by Mr. Rabinowitz. He expressed concern that failure to apply the act of state doctrine might create a situation wherein the courts disputed the expressed objection of the executive branch and thereby hindered efforts to achieve a negotiated settlement between the United States and the offending state. This struck me as the lesser of two evils because denial of judicial remedies through application of the act of state doctrine has forced private parties to settle with the offending state and thereby foreclosed efforts of the United States Government to obtain satisfaction of its own grievance.

This articulation strikes me as somewhat unclear so I will describe an actual example: In 1973, the United States Government formally protested through diplomatic channels the Libyan act of "political reprisal against the United States Government" which, almost incidentally, took the form of an expropriation of Hunt's interests. When Hunt's efforts to seek American judicial redress were frustrated by the act of state doctrine, Hunt was left with no choice but to accept the "compensation" that the Libyans offered and thereby accept the legality of the Libyan action. In effect, this resulted in a private party settling a U.S. Government grievance for the payment of $17 million. If the executive branch is to be undercut by anyone, I would prefer it were the courts rather than private citizens.

Please let me know if I can be of further assistance as you proceed in this important work.

Sincerely,

G. Henry M. Schuler

G. Henry M. Schuler

P.S. In view of our exchange about the overlap of strategic/political and commercial/economic concerns, you may be interested in the enclosed effort to restore some perspective to the policy-enervating "oil glut".

Senator MATHIAS. Our next witness is Mr. Rabinowitz.

STATEMENT OF VICTOR RABINOWITZ, ESQ., BOUDIN, STANDARD, KRINSKY & LIEBERMAN

Mr. RABINOWITZ. Thank you, sir.

I had prepared a statement, but I am going to take advantage of your suggestion that we file within 3 weeks because I have in mind the observation you made at the beginning that we would like as much discussion about specific points, and I find I have a pad full of such discussion.

I might say that I do not know who is really in favor of this bill except Professor Wallace and perhaps the Senator. Everybody else seems to have so many modifications that it would require a significantly different bill, and I am not sure that a discussion around this bill——

Senator MATHIAS. It is not always fatal, though, you know.

Mr. RABINOWITZ. I know. I am fully aware of that, and I like that because I do not think——

Senator MATHIAS. As long as you have a lot of enemies, why, that is helpful.

Mr. RABINOWITZ. Yes.

Senator MATHIAS. So long as they are not all coming at you from the same direction.

Mr. RABINOWITZ. Let me say a few things, and this is going to be somewhat disorganized because I am trying to answer the remarks that have been made by a number of speakers, including the Senator.

Some discussion has been had concerning the origin of the act of state doctrine, and while it is true that in the United States this has sometimes taken the form of questions of separation of powers, particularly in the *Sabbatino* and subsequent cases, the fact is that the doctrine is a much more fundamental one. Mr. Justice Holmes in the *American Banana* case said the meaning of sovereignty is that the decree of the sovereign makes law, and the British court said:

> It is well settled that the validity of the act of an independent sovereign Government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country.

Now, this issue of the meaning of sovereignty is not one that we ought to toss aside too readily. With all due respect, I suggest that the United States has on occasion taken action in violation of international law. We are not perfect any more than any other nation. And as a matter of fact, currently the United States has seized millions of dollars, without paying any compensation for it and without any suggestion of due process, from Cuban citizens, not the Cuban Government, but Cuban longshoremen, Cuban widows, many Cubans who made deposits in American banks or who bought American property, and all of this has been taken without any compensation.

So let's not be too smug about what other countries are doing to us. If I have the choice of being concerned about a longshoreman who cannot get back $5,000 from a life insurance policy here in the United States and the problems of Hunt, I am not altogether sure where I would come down. I suspect that the longshoreman also needs his money.

The statement has been made both by the chairman and by a few other people here that in no other country is this doctrine accepted. Sometimes the point has been formulated differently—that in no other country with an advanced legal system has this doctrine been accepted.

Now, I do not really accept that. The vocabulary is different. The words "act of state" are not commonly used in many jurisdictions. But I think that basically the law of Great Britain and the law of France and the law of Italy and the law of Japan, and many other countries as well, perhaps, all recognize that what we know as the act of state doctrine is a part of their law.

So it is not a freak doctrine that only we adopt. And the reason again, as I say, is that this is essential to the concept of sovereignty. Neither England nor France nor any other country would like to have other courts of other nations sit in judgment on acts done within their own territory. I do not know of any cases in those nations in which a majority of the people live—that is, I do not know anything about decisions of the courts of Africa or Latin America or Asia or Eastern Europe treating of this problem at all, but even in the highly industrialized countries, the concept of sovereignty, of the validity of act done by a sovereign within its own territory is a pretty important one.

Now, here of course we have a different reason, an additional reason, and that has to do with the separation of powers. The representative of the Justice Department made a point which is of the greatest importance and which has been made by at least four judges of the U.S. Supreme Court, been made several times. Let us suppose that the State Department takes a position on, let us say, the Libyan nationalizations or the Cuban nationalizations, or any other nationalization, and then subsequently that issue is presented to the court. What is the court supposed to do if it finds that the judgment of the State Department was wrong? What is a court supposed to do? Is it supposed to say, "Well, we think the judgment of the State Department is wrong and we repudiate it?" That would be dreadful. It would make it impossible to settle anything by diplomatic means. Or should it say, "Well true, we have sworn to uphold the law. However, in this case we will wink a little bit and we will support the position taken by the State Department."

I think the position taken by the representative of the Justice Department was the opposite. She said if the court decides a certain way on questions of international law, it will interfere seriously—or may interfere seriously with the ability of the State Department to settle those questions. And this is not a trivial matter because most of these cases come up in highly important political contexts, whether they be expropriations, whether they be antitrust cases, very important issues are involved in which the executive branch is primarily concerned.

The issue of whether one litigant or another litigant wins the lawsuit is, of course, of great importance to the litigant, but the issue of the integrity of the executive branch and the judicial branch in handling a dispute is very much greater. And I do not believe that the judicial branch should be put in a position where it must necessarily follow the dictates of policy decisions made by the executive branch.

In the *OPEC* case which has been referred to frequently here—I am not going to read it because I do not have the time, and it is available to everybody—the court pointed out that these questions come up before judges who are really not qualified to handle the matter. They come up in a piecemeal way. They come up on pleadings in which different kinds of issues are given specific weight, a good deal of it is done by means of the maneuvering, or perhaps I'll say the manipulation of lawyers who try to get a case presented in a particular way on a particular issue, and courts are put in a position, are they going to decide international law on the basis of this kind of presentation by a lawyer?

Really, I think that such a thing is contrary to the best interests of the United States, however good it may be for one or another of the litigants in the case.

There has been a suggestion, although it is not contained in the draft of the bill that I have, that this bill accepts the political question doctrine so that cases may still be decided on that basis. Almost all act of state cases are political questions. There may be some trivial ones that are not, but the large majority of them are political questions, and if you will read the definition of a political question set forth in *Baker* v. *Carr,* you will find that the act of state case, the normal nationalization case, for instance, meets every one of those qualifications. There are no recognizable rules of law that can be applied. It results in the possibility of a conflict between the executive branch and the judicial branch, and a whole host of other characteristics of the political question.

Now, I do not think that that is true of the *Filartiga* case. In his decision in *Sabbatino,* Judge Harlan said that there are some areas in which international law is pretty well recognized, and in those he saw no reason that the court should not apply them. And I think that has to do with the torture of an alien. I do not know of any principle of international law that suggests that may be permissible.

Just one thing more and I will be finished, although I have a lot of other things to say. It has been suggested by some of the members of the last panel that there is no international consensus on antitrust law. There is no international consensus on the issue of nationalization either, and the suggestion is made in the bill that this can be determined by reference to article 38 of the statutes of the International Court of Justice. I just point to a statement made a few years ago by the late judge Richard Baxter who was a judge of that court; he went through the article 38 paragraph by paragraph and pointed out that none of them were applicable or helpful in determining what the international law is. The fact is that international law is changing, and it is changing very rapidly. And as he pointed out, the only consensus we can reach—or perhaps it was Professor McChesny who pointed out, one of them did—the only consensus we can reach with respect to the law of nationalization is that there is no consensus.

Senator MATHIAS. Thank you very much, Mr. Rabinowitz. You take a very pragmatic approach to this problem.

You raise certain cautions which we clearly should be observing. I will look forward to your statement which you say you will redraft in light of the discussion we have had today, and I think that will perhaps be the most useful way for us to proceed.

Mr. RABINOWITZ. Surely.

Senator MATHIAS. Thank you very much.

[The prepared statement of Mr. Rabinowitz follows:]

STATEMENT BY VICTOR RABINOWITZ TO THE SENATE COMMITTEE ON THE JUDICIARY, CRIMINAL LAW SUB-COMMITTEE RELATING TO S.1434

I am a member of the firm of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C. For the past 20 years a major portion of my practice has been in the field of international law with particular reference to the application of the act of state doctrine. I was counsel for Banco Nacional de Cuba in the Sabbatino case, the First National City Bank case, and the Dunhill case, and I have written and lectured extensively on various aspects of the subject before this Committee.

This statement is submitted pursuant to leave of Senator Mathias and is intended to supplement the oral testimony given before the Committee on September 14, 1981.

There are primarily two points which I would like to emphasize in connection with consideration of the Bill.

I. The Search For A Rule Of Law Applicable To Nationalization Disputes.

The Court of Appeals of the Second Circuit in its decision in the Sabbatino case, after noting that nationalization issues must be determined by reference to international law, went on to say:

> One pitfall into which we could stumble would be the identification as a fundamental principle of international law or some principle which in truth is only an aspect of the public policy of our own nation and not a principle so cherished by other civilized peoples. In avoiding such an identification we must take a more cosmopolitan view of things and recognize that the rule of law which we municipally announce must be a rule applic-

> able to sovereignties with social and economic patterns very different from our own.

The Supreme Court opinion in the same case devoted much attention to the inherent difficulties in finding international law which might be applied to the Cuban nationalizations. Pointing to the wide disparity of opinion as to the law governing such matters, the Court pointed out that the views of the capital-importing countries differed markedly from the views of the capital-exporting countries. To this we might add the observation that the international law created in the 18th, 19th and early 20th centuries was a law developed primarily by European and United States scholars. There was no input at all by the nations of Asia and Africa -- prior to 1945, there were few independent states in those areas of the world. The Latin American countries, in those years, had developed a system of international law in sharp dissent from the theories espoused by the Western industrialized states.

It should not come as a surprise, therefore, that with the admission of over 100 new states to the family of nations since 1945, and with the development of independent views about international law in those states, that the uncertainties always existing in any system of international law should have been significantly increased. It will be noted that most of the new nations were, in the words of Mr. Justice Harlan, capital-importing, so that most of them declined to accept the law developed by capital-exporting nations.

S.1434 addresses that matter in Sec. 4 by defining international law as "the law referred to in Article 38 of the Statute of the International Court of Justice as further refined by such Acts of Congress heretofore or hereafter adopted. . . ." As Prof. Lillich pointed out in his testimony, there is no justification for including, in the definition of international law, reference to Acts of Congress. An Act of Congress cannot change international law and an effort to do so would produce a version of such law which would receive no recognition or respect from other nations and so would inhibit rather than promote the development of international law.

References to Article 38 of the Statute of the International Court of Justice are of no help at all. The views of Judge Richard R. Baxter, who at the time of his death was a Judge of the Permanent Court of International Justice, are particularly appropriate, not only because he was one of the world's outstanding authorities on the subject of international law, but because he addressed himself to the particular problem we are now discussing. Discussing the various theories of international law and noting the wide diversity of opinion on the subject, he said:

> The situation is the more appalling if one attempts to determine the state of the law by reference to the sources of international law referred to in Article 38, paragraph 2, of the Statute of the International Court of Justice. Particular international conventions, to use the terminology of the Statute, do exist, but they reflect the bargain struck by pairs of treaty partners rather than any general rule of law. . . . Of general international conventions "establishing rules expressly recognized by the contesting states" there is effectively none binding on a substantial number of developing and developed states.
>
> The practice of states with respect to compensation for nationalized property is so diverse that one cannot speak of any "international custom, as evidence of a general practice accepted as law," as the

> Statute refers to customary international law. That leaves the subsidiary means for the determination of rules of law, "judicial decisions" and the "teachings of the most highly qualified publicists." What judicial decisions there are fail to carry weight with many states. Their age, the difficulty of determining the precise extent of their holdings, the difference between the social and economic conditions of the past and those of today, changes in the nature of foreign investment, and the international relations of the past which gave rise to the decisions make them suspect in the eyes of many states turning to nationalization of foreign property as a means of dealing with their economic problems. . . . Decisions of the International Court in the Hague bearing on nationalization are few and fail to confront the main issues of standard and of valuation.
>
> A number of "eminent publicists," . . . have attempted to give expression to rules of international law on the nationalization of property, but there has certainly been no uniformity of views amongst these "eminent publicists" from different quarters of the world and from different legal systems.

There has been much activity at the United Nations and elsewhere in an effort to establish generally recognized principles respecting compensation for nationalized property, and it may be that some day such rules may be generally recognized, but it is clear that there is no consensus now. As Prof. MacChesney, former President of the American Society of International Law said, the only concensus which appears from the writings on the subject "is that there is no concensus on standards of valuation and likewise no concensus on agreed procedures for settlement of such issues.

Beginning in 1962 a series of votes taken in the General Assembly of the United Nations have considered the very issue raised by this Statute, namely the law applicable to nationalization disputes. Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources provides that in cases of nationalization the foreign owner shall be paid

> appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

As Prof. Baxter has pointed out, the near unanimity of the vote in support of that Resolution "indicates no more than the willingness of a large number of states to be content with an essentially ambiguous formulation, which speaks in the same breath of a national standard and an international one."

The adoption of Resolution 1803 did not put the matter to rest, and in 1973 the General Assembly, in its Resolution 3171 (XXVIII) proceeded to affirm that:

> [T]hat application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their national resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures. . . .

Aside from a polite reference to Resolution 1803 in the Preamble to Resolution 3171, not much was left of the 1962 resolve. The "appropriate compensation" of Resolution 1803 now became "possible compensation," and Resolution 3171 states clearly that the nationalizing State is entitled to determine the amount of such compensation, as well as the mode of payment of compensation found to be due. That Resolution was adopted by a vote of 108 to 1 with 16 abstentions, most of which were industrial States, including the

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United States.

The next relevant action took place on May 1, 1974, when by Resolution 3201 (S-VI) the General Assembly adopted its "Declaration on the Establishment of a New International Economic Order.." Although several of the industrial countries entered reservations as to the Resolution, it was adopted without vote. In this Declaration, the only reference to compensation was the resolve that states under colonial domination were entitled to compensation for the exploitation of their natural resources, thus turning the whole question of compensation on its head.

On January 15, 1975, the General Assembly adopted the "Charter of Economic Rights and Duties of States." Paragraph 2(c) of Article 2 of the Charter reads as follows:

> 2. Each State has the right:
>
> * * *
>
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

In the course of debate on the Charter in the Second Committee, an amendment was offered by the United States and thirteen other nations, proposing to substitute for the language in paragraph 2(c) a provision that "[e]ach State has the right . . . [t]o nationalize, expropriate or requisition foreign property for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid." This proposal was defeated by a vote of 87 to 19 with 11 abstentions. The text set forth above was then adopted by the General Assembly by a vote of 104 to 16 with 6 abstentions. The United States cast one of the dissenting votes, as did several other western states.

It is clear that Article 38 is of no help in defining international law, certainly in the areas addressed by S.1434. It may be that in some situations there is a prevailing international custom or an appropriate international mulilateral convention which will assist a court in determining international law. This, for example, may be so with respect to the protection of diplomats, or with respect to the torture of prisoners, or with respect to discrimination on account of color. But no court charged with the task of determining the international law applicable to nationalization issues could be helped by reference to Article 38, and reference to that article in this bill is meaningless.

II. The Possibility Of Conflict Between Executive And Judicial Branches.

The situation described above is made much more serious because of our doctrine of the separation of powers. We must not force the courts into a situation in which they will become, as Mr. Justice Brennan has warned, "embroiled" in an international dispute, the settlement of which is the sole responsibility of the Executive Branch. The issue is an important and delicate one and has been discussed by the opinion of the Supreme Court in the Sabbatino case and by the dissenting opinion in the First National City Bank case. This aspect of the problem was referred to in the statement submitted at the Hearings on S.1434 by the Justice Department. It is often true that the Executive Branch will take a position on a nationalization dispute long before the issues are presented to a court. This is especially likely to be true when a broad nationalization program of a foreign nation affects important holdings of American nationals. In such cases, the State Department has not hesitated to express its views that such taking of property was a violation of international law. In such event, a court that passes on the issue many months, or even years later, may be confronted with the dilemma against which Mr. Justice Brennan warned and concerning which the Justice Department shows justified uneasiness. The court's view of international law may well differ from that of the State Department, or it may find that, contrary to the public position taken by the Executive Branch, there is no ascertainable international law on the subject. In such a case, a court will be confronted with the choice of either repudiating the views of the State Department, thus embarrassing the Executive in its conduct of international affairs, or shaping its view of the law to conform to that of the State Department, thus sacrificing its own independence.

This danger is not an imaginary one and has occurred in nationalization disputes in the past. The situation is particularly serious because of the present state of international law as set forth in Section I above. It is obvious that most of the nations of the world, in which most of the population of the world lives, are in sharp disagreement with the State Department's traditional view on the law of nationalization. This disagreement exists not only as to countries whose political views are often hostile to those of the United States, but nations who have traditionally been among our staunchest supporters. Every Latin American country joined in opposition to the United States' position in considering Resolution 3171 and the Charter of Economic Rights and Duties of States.

It is difficult to see how a court applying Article 38 could come to the conclusion that the traditional United States' view represents the views of most civilized nations. And there is no reason to believe that the State Department, at least for the present, is prepared to abdicate its historical position on the subject, by yeilding to the views expressed by the United Nations. A clash between the Executive Branch and the Judicial (in any nationalization dispute) is almost required by this law. The Supreme Court in Sabbatino in applying the act of state doctrine solved this dilemma by taking the position that issues of this kind are within the jurisdiction of the Executive Branch and that the Judicial Branch would abstain from accepting such cases for decisions. Such is the requirement of our Constitution which gives to the Executive Branch the duty of conducting foreign affairs. The Executive Branch should not be permitted to pass the buck to a Judiciary which is totally unqualified to pass on the political issues present in such disputes.

VICTOR RABINOWITZ, Esq.
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman, P.C.
30 East 42nd Street
New York, New York 10017

Senator MATHIAS. Our final witness for the day is Professor Lillich from the University of Virginia.

I think we owe him a debt of gratitude for foresaking Charlottesville in the loveliest time of the year.

STATEMENT OF PROF. RICHARD LILLICH, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. LILLICH. Well, Senator, you had a colloquy with some of the attorneys. Let's have a little colloquy from the point of view of law professors.

If your bill goes through, I will be deprived of my stock in trade for at least six sessions every year because it will eliminate all of the problems of *Sabbatino* and its progeny.

By a remarkable coincidence, I got the invitation on Thursday afternoon to appear here, and I had already taught several sessions on *Sabbatino,* so we had a drafting session on Friday morning. The class agreed that the present situation with respect to the act of state doctrine is one of utter confusion. That was borne out well by the session that we had and the points that were raised, some of which I will focus upon today.

Senator MATHIAS. Well, before you proceed, let me assure you that if we should by any chance eliminate the course material in the course of enacting this bill, that we will provide you with plenty more.

Mr. LILLICH. Well, I am sure some of the points raised by some of the antitrust people today would keep me occupied for some time to come, and my students as well.

I was impressed, or I should say depressed, by the statement from the Department of Justice representative today saying that the bill might be, and I quote, "interpreted by the courts as a mandate for greater judicial activism in defining and applying international law." I would applaud your bill for just this particular reason, namely, that it does get the courts into where they should be, namely, the determination of international law issues. It is high time in this as well as several other areas, nationalization and other areas, that this development occur.

Therefore I support the bill, subject to some modifications.

Now, I would like to make just a few general observations and then three specific points, and then take your questions, if any.

First of all, insofar as general observations are concerned, as we all know from the *Paquete Habana* that you cite in your recent law review article, the Supreme Court has said that international law is part of our law and that it is to be applied whenever appropriate.

Now, there's two reasons for that. First of all, by doing that we give justice, we give relief in applicable cases. This is what the courts are all about. Courts are not designed to grind out decisions for jurisprudes, even for law professors; they are designed to give relief in particular cases.

And second, of course, the decisions are designed to establish precedents. I think the point was well made earlier that the United States, by foregoing decisions in the area of nationalization and expropriation, has really given up a splendid opportunity to develop the law of nationalization and compensation.

With all due respect, Mr. Rabinowitz, courts in other countries are grinding out decisions, and some of them, of course, are unfavorable to U.S. interests, the interests of Congress, the interests of the courts themselves, and, of course, the interests of the executive.

So I would certainly strongly support both for practical and jurisprudential reasons getting the courts involved in this decisionmaking process.

With respect to several of your questions earlier, I think there are no international law problems here. Act of state is not an international law doctrine, nor—and this goes to the question you directed to Professor Wallace—is there any constitutional problem whatsoever. Not only did the Court in *Sabbatino* say that specifically—it did mention constitutional underpinnings, but no constitutional law problems—but the fact that in the subsequent litigation over the *Sabbatino* amendment in 1965 and thereafter the Court denied certiorari indicates quite clearly to my mind that there is no constitutional issue here. Thus, if you want to go ahead and legislate as you have done in the sovereign immunity area, you may do so.

Now, with respect to my specific observations, they are in three areas: First of all, the scope of the bill; second, the definition of international law; and third, the apparent elimination—and I say apparent elimination—of the executive from any role in the act of state decisionmaking process.

I query aspects of one and two, and I heartily applaud No. 3, getting the executive out of the decisionmaking process.

First of all, as to scope, the bill's scope is relatively broad. It applies to Federal and State courts because we are dealing with the Federal act of state doctrine here, and it applies in any case in which the act of state is contrary to international law. As you are well aware, the *Sabbatino* decision was a relatively narrow decision dealing with the question of the taking of property, and the *Sabbatino* amendment or the second Hickenlooper amendment in 1964 and 1965 fit the *Sabbatino* case, as it was intended to do, just like a glove, and therefore also is restricted to the taking of property. Now there are many areas—the antitrust act of state area is one, the human rights area is another—where acts of foreign states have arisen in subsequent years, and, of course, query: What is the law there?

Well, there are certainly policy factors in the *Sabbatino* case which can be applied. I think Mr. Rabinowitz was right in what he suggested, that the *Sabbatino* case, the rationale of Harlan's opinion there, applied to many of the human rights cases would result in the act of state doctrine not being applied because there is an international consensus against, say, torture, as he pointed out.

Nevertheless, not all courts have taken that approach. I point to the Court of Appeals of New York which, in the New York *Times* case involving racial discrimination in southern Africa, in 1974, actually relied upon the act of state doctrine in refusing to go into and condemn certain racially discriminatory acts and their impact in New York.

Now, presumably the bill eliminates this problem, but I say presumably because I do have problems with section 4(c) of the bill. That section goes on and states, indeed, instructs courts in the

United States to apply international law "in any case involving a violation of international law by a foreign state with respect to the personal," and I assume that is a typographical error, "the person, property or contractual rights of a person not a national of that state." In other words, the alternative reading is that foreign acts of state involving nationals of that state, although contrary to international law, still might permit the invocation of the act of state doctrine.

Now, if this is a correct interpretation of section 4(b), and it seems like a viable possibility to me, then the bill in reality is deprived of a lot of its potential effect at least in the human rights area.

Now, the *Filartiga* case is not a case where the act of state doctrine was involved. It was not invoked, and it would not have been applied if it had been invoked. I do not believe that any court in the United States would have relied upon it, for the reasons that are stated in *Sabbatino.* Nevertheless, as I pointed out, there have been other human rights cases where the act of state doctrine has been invoked and applied, and I would hate very much for it to be invoked by parties relying upon this bill.

So from my own perspective, unless I read section 4(b) incorrectly, or unless the reference in section 3 to "in any case" preempts this special reference in section 4(b), in the abundance of precaution, I would recommend deleting that section from the statute as unnecessary, perhaps superfluous, and certainly, at least from my perspective, somewhat dangerous.

A second specific point deals with the definition of international laws found in section 4(a). Now, I applaud the first three lines referring to the definition of the International Court of Justice, article 38 of the court's statute. Article 38 sets out the basic sources and evidences of international law, and it is what U.S. courts should be following, not the advice of the executive branch nor, as you will see in just a moment, particular references to U.S. statutory law. Indeed, the title of your act, the International Rule of Law Act, seems to me to indicate quite clearly that we ought to apply international law sources here. Frankly, I do not have the fear and timidity or the apprehension expressed by several observers that we ought to be afraid of what our courts are doing in this area.

U.S. courts historically have played a prominent role in the development of customary international law, going back to Mr. Justice Marshall in *The Schooner Exchange,* the *Pesaro* case, and a variety of other cases. Indeed, the Supreme Court made a lot of international law negatively by their nondecision in the *Sabbatino* case. I, for one, have no apprehension about relying upon domestic court judgments. In the rare case where the United States might be a defendant, as the Department of Justice representative indicates, and in the rare case where customary international law exceeds, as the District Court in *Fernandez* v. *Wilkinson* did find it to exceed, U.S. constitutional and statutory law, I applaud that result. I am not afraid of international human rights law applied elsewhere, nor am I afraid to have it applied in the United States.

The difficulty is that your bill goes on, in the last 3½ lines of section 4(a), to purport to refine international law. It seems to me that the international law that is good enough for the International Court of Justice is good enough for the United States as well, and therefore to subject it to such acts of Congress heretofore or hereinafter adopted to clarify principles of international law in effect is adopting a chauvinistic American approach to international law. As long as your bill bears the title it does, I think it ought to refer to basic customary international law, basic treaty law. We will show a greater respect for the rule of law that way, and the judgments of the courts in the United States will have higher prestige and can be enforced elsewhere to a much greater extent if they are based only upon international and not also upon U.S. statutory law.

Indeed, Mr. Rabinowitz actually made a strong argument in favor of my point when he pointed out that the law is changing. Of course it is changing, and therefore you don't want to put in an inflexible statutory standard. If customary international law does change over the next decade or the next several decades, why should the courts not be allowed to change their decisions as well? Why should they be frozen into a statutory standard?

Finally, my last point—and the one where I heartily applaud the bill—stems from what I gather to be the intention of the bill, namely, to exclude the executive branch from any role in act of state cases. This is an apparent exclusion, I state in my prepared testimony, because there is no specific language in the bill that says so.

I will finish here in 30 seconds just by pointing out that in the dissent in the *Sabbatino* case by Mr. Justice White—or Justice White as the Justices now address themselves—and also in the *Sabbatino* amendment, and I think a reference by Justice Powell as well, and indeed, the reference in the *Citibank* case by the three-judge majority, the justices of the Supreme Court, or at least five of them, have said in effect that some executive participation is, if not desirable, at least permissible under this constitutional underpinning doctrine. It is not required by constitutional law, however, and I think it just creates a host of problems. Indeed, in past hearings on legislation such as this bill, the executive branch has pointed out a few of them.

Thus I would just hope that, as in the area of the sovereign immunity bill—although that bill itself does not exclude the executive branch, the legislative history makes it quite clear that the old suggestions of sovereign immunity are not to be entertained by the courts anymore—I would hope that you would lay in these hearings the groundwork for such an interpretation with respect to this legislation before you that I heartily support, subject to the modifications that I have suggested.

Senator MATHIAS. Well, thank you very much.

If we are to determine international law according to the rules that are set forth in article 38 of the Statutes of the International Court, what guides do we have as to the substance of international law? We have the writings of scholars and academics, but what else do we have which will be available to judges if they have to determine some reasonable concepts of accepted international law?

Mr. LILLICH. Well, the two primary sources, of course, Senator, are treaties—multilateral treaties and bilateral treaties, and there is a wealth of treaty practice in this area—and customary international law. I will come back to that in just a moment. You mentioned commentators and also, of course, there are judicial decisions as well as general principles. Commentators and judicial decisions are subsidiary sources of international law. General principles, which you might find in constitutions or statutes of the various nations, are direct evidence of international law and may contribute to the formulation of customary international law.

If you take a look, for instance, at any of Mr. Rabinowitz' briefs in the *Sabbatino* case, or the Government's briefs or the briefs of other private parties, you will find a wealth of sources. There is no doubt that there is a tremendous consensus now that when property is nationalized, compensation has to be paid. The fighting issue, as it has been now since the time of the *Sabbatino* case, is the amount of compensation that has to be paid. Indeed, I have had the privilege of editing three books on that, and I am not sure it is clarified yet.

But right now, as far as I understand it, the *Sabbatino* case, or its ultimate aftermath, is working its way up from the district court in New York to the second circuit and eventually perhaps to the Supreme Court, and so eventually there will be some conclusion about whether the compensation there is adequate or not.

So I for one have no difficulty with the court's wading in and attempting to clarify the law here. International law often is very ambiguous, but anybody who has taught corporation law knows that under the Securities and Exchange Act what is a fiduciary duty of a corporate insider is very ambiguous as well. If courts can handle matters like this, they can handle international law matters. As for the observation from the representative of the Department of Justice that they have not had much experience, well, they have not had much experience just because these things have not been argued and because the act of state doctrine has prevented them from going ahead.

I for one, being somewhat familiar with attempts now to educate and inform the judiciary of these international law matters, think that you can perceive a definite awareness of international law and a definite sophistication in handling international sources starting to surface, and not only on the eastern seaboard or the west coast, but in the heartlands as well.

Senator MATHIAS. Well, just for one example, do you think there is a consensus—and I am talking now about an international consensus, not a consensus within this country, but an international consensus—as to the law governing the nationalization of property that is owned by aliens?

Mr. LILLICH. I will just add to what I have said before. Obviously this is a major area of dispute between the Socialist bloc—or the Communist bloc, as we used to call it—and the Western World, with a lot of Third World countries taking various positions. Yet if you look at bilateral treaties, if you look at lump-sum compensation agreements, if you look at the writings not just of Western authors but other authors as well, if you look at the flow of U.N. resolutions, it seems to me that one could argue with great confidence in the International Court of Justice now that you cannot take foreign-owned property without paying compensation. The fighting issue, as I indicated before, is the amount of compensation.

If you have ever sat on a zoning and appeals board dealing with the amount of compensation to be paid to somebody whose property is taken in Charlottesville or elsewhere, you know that that is a dispute in domestic law as well.

I think the more that domestic courts and the more that international tribunals have to deal with this, as they have had to deal with it in recent years, the greater a consensus will develop behind the rule, and although it will obviously always be phrased at a high level of abstraction, just like due process or just compensation in our own Constitution, that gradually we will have evolving practice coming out of it. I hope the domestic courts—in fact, from the U.S. perspective, I certainly hope that U.S. courts will—contribute to this process and that we do not in effect let the action develop by default with other courts reaching decisions contrary to U.S. interests. After all, international law is shaped by among other forces the decisions of domestic courts in 154 or 155 states. Why should we handcuff and deprive our courts of the opportunity to participate in this process?

Senator **Mathias**. Well, I am interested by that comment because I thought maybe earlier I was a little too strong in expressing similar views.

Mr. **Lillich**. Not at all, not at all, and I think when you get Professor McDougal's testimony in the record, you will see that this is a widespread appreciation among international law professors and practitioners. As for the latter, obviously there is a certain aspect here of whose ox is being gored. If you will reread the hearings, which I am sure you have, in 1964 and 1965 on the adoption of the Sabbatino amendment, you will find that all the oil companies were very much for this particular amendment. Now that is not true. It is not true with all the banks as well.

But here, speaking as a somewhat detached academic, I think it is best just to step back and take a look at this situation where the United States has gotten itself in a situation where its courts are under tremendous restraints which are not restraints in other countries. I am fully aware, as Mr. Rabinowitz pointed out, that other countries may well sidestep some of these issues, or perhaps they do not sidestep them, they just decide them on conflict-of-laws grounds contrary to our particular approach, or because their public policy might not reflect our public policy.

In any event, there is certainly no such thing as an international act of state doctrine, and as far as I know, no courts—and here I will join issue with Mr. Rabinowitz—have held that there is an act of state doctrine in other countries. So I just see absolutely no reason why the United States should continue to handcuff itself in this regard. The fact that the Department of State over the years has come around from the position it took in 1964 to the position taken in the 1970's by such legal advisers as John Stevenson and Monroe Leigh indicates to me that the wisdom of the last 17 years clearly indicates that it is in the U.S. interest to have domestic courts speaking out here. They are not going to be at that wide a divergence from the approach taken by the executive branch. I think that is a red herring argument by executive branch people who want to control the development of international law in this area.

There is no doubt that the executive develops more customary international law and more state practice than the courts will ever in the United States. Justice Frankfurter had that point made quite clear to him one time. But to try to preempt the field and in effect chase domestic courts out by saying there should be an act of state doctrine and you should revise your bill to give great weight to what the executive says, weight that will allow the executive to close down domestic courts, I think is extremely misguided.

Senator **Mathias**. Well, we obviously appreciate your views very much, and the thought that you have given to this subject. And again, I invite you to take advantage of the fact that we will have 3 weeks before we send this record to the printer to further elaborate on your views, if you care to do so.

Mr. **Lillich**. Thank you very much, Senator.

Senator **Mathias**. Thank you for being here.

The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 4:09 p.m., the subcommittee recessed subject to the call of the Chair.]

[The prepared statement of Mr. Lillich follows, plus statements from the Chase Manhattan Bank, N.A., Exxon Corp., and Citibank, N.A. were subsequently supplied for the record:]

PREPARED STATEMENT OF RICHARD B. LILLICH

Mr. Chairman and members of the Subcommittee, as one who has been practicing and teaching international law for 24 years (see Annex A), I welcome this opportunity to testify before you today on S. 1434, the "International Rule of Law Act." This bill would eliminate the bar of the act of state doctrine in those cases arising in courts in the United States where the act is alleged to violate international law, thus freeing our courts from their self-imposed shackles and enabling them not only to render justice in appropriate cases but also to contribute to the progressive development of international law. As one who has observed and criticized the judicial confusion in this area over the past two decades (see Annex B), I strongly support the major thrust of the bill and, with certain relatively minor modifications, urge its enactment into law.

Before commenting upon three specific aspects of the bill, Mr. Chairman, some general observations would be relevant. As the Supreme Court has stated in The Paquete Habana, 175 U.S. 677, 700 (1900): "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." By applying international law, courts in the United States, like domestic courts everywhere, render justice and at the same time help develop international law. On this latter point, it should be noted that Article 38(1)(d) of the Statute of the International Court of Justice makes judicial decisions a subsidiary means of determining international law. Thus, by invoking the act of state doctrine, as courts in the United States have done since the Supreme Court decided Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the courts forego an excellent opportunity to contribute to the clarification of international law norms. This unwillingness to apply and clarify international law, while applauded in some quarters (see R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER /1964/), is not in the short-range interest of U.S. litigants seeking redress nor, for that matter, in the long-range interest of the United States itself. Although slightly different policy factors are involved, it is hence both appropriate and desirable that Congress, as it did when it enacted the Foreign Sovereign Immunites Act in 1976, step in and order the courts to traverse where they hitherto have feared to tred. In my opinion, Congress should not feel inhibited in so doing, since, as the Supreme Court itself has held, the act of state doctrine is neither an international law requirement nor one mandated by the Constitution.

Turning now to specific observations about the bill, they are clustered around three specific points: 1) its scope; 2) its definition of international law; and 3) its apparent elimination of any Executive role in the act of state decisionmaking process.

With respect to scope, I am glad to see that Section 3 proposes to add a new Section 1657 to Title 28 which eliminates the act of state doctrine in all courts in the United States -- both federal and state -- and, moreover, does so "in any case in which the act of state is contrary to international law." As the Subcommittee is well aware, both Sabbatino and the so-called second Hickenlooper (or Sabbatino) Amendment, 22 U.S.C. §2370(e)(2), which fits it like a glove, are limited to acts constituting a "taking of property." This bill preempts both Sabbatino and the amendment, and rightly so. In substantive areas other than the taking of property -- such as the antitrust area -- the act of state doctrine has caused problems in recent years. One area where unfortunate and unnecessary difficulties have arisen involves international human rights law issues. Thus the New York Court of Appeals, mistakenly in my view, invoked the act of state doctrine in a case involving South Africa's policy of racial discrimination. New York Times Co. v. City of New York, Commission on Human Rights, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977). The bill thus presumably eliminates both the direct application of the act of state doctrine and its chilling effect in human rights as well as all other cases.

I say "presumably" advisedly, since Section 4(b) contains language which, to me at least, confuses the issue. It instructs courts in the United States to apply international law "/I/n any case involving a violation of international law by a foreign state with respect to the personal /sic/, property, or contractual rights of a person not a national of that state...." (Emphasis added.) In other words, foreign acts of state involving nationals of that state -- although contrary to international law -- still might permit the invocation of the act of state doctrine. That view of Section 4(b), if it is a correct interpretation of the provision, deprives this bill of much of its present and potential effect in the international human rights area. It once was true that acts of a state touching its nationals could not be deemed to violate international law. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), about which the Chairman has written, makes clear that such is no longer the case, and in view of the increasing frequency with which international human rights law is being invoked in courts in the United States I would think it tragic if this bill were deemed to insulate foreign states from an examination of their acts vis-à-vis their own nationals. Perhaps I interpret Section 4(b) incorrectly, or perhaps the phrase "in any case" in Section 3 makes my fears groundless, but in the abundance of precaution I would recommend deleting Section 4(b) as confusing and, indeed, superfluous.

Turning next to the definition of inter~~est last~~national law found in Section 4(a), I applaud the first three lines vouching in the sources of international law found in Article 38 of the Statute of the International Court of Justice. Coupled with Section 6(d)'s repeal of the second Hickenlooper (or Sabbatino) Amendment, which defined international law in the taking of property area to be that body of law articulated by the United States but rejected by most States in the international community, this provision seeks to justify the bill's title -- the "International Rule of Law Act" -- by mandating that the courts look to international law and not international law as chauvinistically viewed by the United States. If courts in the United States are to render decisions truly based upon international law -- decisions which will be accepted in the international community as impartial ones rather than ones reached pursuant to United States policy interests -- such needs must be the case. Unhappily, however, the last 3 1/2 lines of Section 4(a) purport to "refine" the international law that is good enough for the World Court by making it subject to "such Acts of Congress heretofore or hereafter adopted to clarify principles of international law to be applied to United States courts, administrative bodies, and executive officers."

I have no idea what acts already on the books the drafters of the bill have in mind, nor of course can anyone anticipate what legislation may be proposed or enacted in the future which, in view of Section 4(a), would be binding "international law" in courts in the United States. Of course, Congress may enact legislation clarifying, or even preempting, international law at any time. Thus at least the latter half of the reference to statutory law seems unnecessary. To write such a provision into a bill which purports to be an "International Rule of Law Act" seems, to me and I would think a good many observers both in the United States and abroad, to be a curious way indeed of showing respect for the Rule of Law. Certainly it would undercut in large measures the respect that would be accorded decisions of courts in the United States overseas. Judgments obtained here certainly would be questioned in foreign courts much more rigorously when it came to enforcing them if United States as opposed to international law standards were the bases of decision. In short, I would suggest deleting everything in Section 4(a) after the word "Justice."

Finally, I would like to commend the bill for its apparent exclusion of the Executive Branch from any role in act of state cases. The word "apparent" is used advisedly, since no specific language in the bill says so. However, in view of Section 6(a)'s repeal of the second Hickenlooper (or Sabbatino) Amendment, which, following Justice White's dissenting lead in Sabbatino permitted the Executive in effect to step in and veto a court's taking of jurisdiction in an act of state case, one logically may construe the bill as reading the Executive out of act of state cases. This development is an excellent one, paralleling Congress's apparent exclusion of the Executive from the soverign immunity decisionmaking process under the Foreign Sovereign Immunities Act. In addition to Juctice White, Justice Powell in the Citibank Case, 406 U.S. 759 (1972), has taken the view that courts should decide act of state cases unless the Executive steps in and flashes the "red light." Moreover, the three-justice majority in that case based their opinion on the fact that, in the so-called "Stevenson Letter" in that case the Department of State~~s~~ had given the court the go-ahead, i.e., flashed the "green light." Thus a majority of the justices probably accept some sort of Executive role in act of state cases, confusing as their attitude towards it may be. However, this role is not one mandated by the Constitution, as they held in Sabbatino and its progeny, and in view of the confusion in the area and the fact that Executive intervention in such cases only would undercut the precedential effect of court decisions -- just like requiring courts to base their decisions upon international law as "further refined" by United States statutes -- I hope that these hearings lay the necessary legislative history for concluding that the Executive has no role, if indeed it ever did, in the act of state decisionmaking process.

Mr. Chairman, I would like to thank you for the opportunity to appear today and excess my views on S. 1434. You are to be commended for your efforts to bring order out of confusion in the act of state area. The bill you have before you makes it clear that courts in the United States should apply international law in the great tradition of the Paquete Habana. Subject to the reservations I have expressed, I am pleased to be able to endorse it enthusiastically.

ANNEX A

RICHARD B. LILLICH

Richard B. Lillich is Howard W. Smith Professor of Law at the University of Virginia School of Law, President of the Procedural Aspects of International Law Institute, and an international legal consultant. He received the A.B. from Oberlin College (1954), the LL.B. with Specialization in International Affairs from the Cornell Law School (1957), and the LL.M. (in International Law) and J.S.D. from the New York University School of Law (1960).

Admitted to the New York Bar in 1957 (and to the District of Columbia Bar in 1980), Lillich engaged in private practice until 1960. He then joined the faculty of the Syracuse University College of Law, on which he remained until 1969 when he moved to the University of Virginia. He has spent four years in England as a Ford Foundation Law Faculty Fellow (1963), a John Simon Guggenheim Memorial Fellow (1966-1967), a National Endowment for the Humanities Senior Fellow (1974-1975), and a Ford Foundation Fellow (1980-1981). He was the Charles H. Stockton Chair of International Law at the U.S. Naval War College (1968-1969), a Senior Fellow at the Center for International Studies, Cambridge, England (1974-1975), a Visiting Professor at the New York University School of Law during the fall semester of 1977-1978, and the Thomas Jefferson Visiting Fellow at Downing College, Cambridge, England (1980-1981).

Editor of the Procedural Aspects of International Law Series from 1962-1977, he is the author of four of its titles, the most recent being International Claims; Their Settlement By Lump Sum Agreements (1975) (two volumes). He also has edited and contributed to U.S. Ratification of the Human Rights Treaties (1981), Economic Coercion and the New International Economic Order (1976), The Valuation of Nationalized Property (1972-1975) (three volumes), and Humanitarian Intervention and the United Nations (1973). In addition, he is the author of over 50 book chapters, law review articles and other legal studies. His coursebook, International Human Rights: Problems of Law and Policy, was published in 1979.

Lillich is a former member of the Executive Council of the American Society of International Law (1966-1972, 1973-1976), and currently is the Rapporteur of its Panel on State Responsibility and an Editor of its Journal. He is a member of the American Bar

Association, the Association of the Bar of the City of New York, the British Institute of International and Comparative Law, and the International Law Association. He currently serves as Chairman of the American Bar Association's Standing Committee on World Order Under Law and the ILA's International Committee on Human Rights. He is a member of the Advisory Board of the International Human Rights Law Group, the Advisory Board of the Morgan Institute for Human Rights and the Advisory Council of the U.S. Institute on Human Rights. He has served as a consultant to the Department of Justice, the Department of State and the U.S. Naval War College on human rights and other international law matters.

ANNEX B

R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT ch. II (1965); Lillich, A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino, 8 VILLANOVA LAW REVIEW 155 (1963); Lillich, International Law, 17 SYRACUSE LAW REVIEW 168, 169-74 (1965); and Lillich, The Role of Domestic Courts in Promoting International Human Rights Norms, 24 NEW YORK LAW SCHOOL LAW REVIEW 153, 155-64 (1978).

STATEMENT OF
THE CHASE MANHATTAN BANK, N.A.

Before the Subcommittee on Criminal Law
Of the Senate Committee on the Judiciary
on S. 1434, "The International Rule of Law Act."

The Chase Manhattan Bank welcomes this opportunity to submit for the record its views on S. 1434. The bill would prohibit courts in the United States from refusing, on the ground of the act of state doctrine, to determine the merits in any case in which the act of a foreign sovereign within its jurisdiction is found contrary to international law.

Doctrines of law that have the effect of closing the courtroom to grievances are inherently controversial, and the act of state doctrine is no exception. We, therefore, believe it is appropriate to review this doctrine and assess its usefulness. We are confident that the record of these hearings will confirm the wisdom of retaining the act of state doctrine as a flexible tool of judicial abstention in cases in which its absence might cause injustice or jeopardize the executive branch's conduct of foreign relations.

The act of state doctrine has admittedly been imperfectly articulated, rationalized and applied. But few other doctrines of law have been required to render service in such widely varying factual circumstances as this one. It is a tool uniquely suited for use in the highly charged atmosphere of international political and economic crisis. This Subcommittee must already be acutely aware of how difficult generally is the fashioning of broad rules of law, even those solely of domestic application. Given the infinitely greater variety of facts, cultures and viewpoints in international relations, we should not be surprised by the imperfections in the act of state doctrine, but rather by its astonishing durability over the last eighty-four years.

However short the act of state doctrine may fall of the ideal of perfect law, it is essential that we guard against replacing the reasonably predictable results of its application with a new set of uncertainties. When Americans or American businesses live or establish offices in foreign countries, they necessarily assume certain risks, including the risk of change in the law, social structure or political situation in the foreign state. But in any event, they know they must comply with the local law and the exigencies of social and political change. If S. 1434 is adopted, they will also have to guess whether each change in local law and every other local governmental act will be regarded by an American court as complying with standards of international law. If such changes and actions are not so regarded, then such Americans will be thrust into an impossible situation: locally, compliance with such acts of state will be required; back in the United States, compliance may lead to liability.

Chase Manhattan Bank's worldwide banking activities and its experience with foreign revolutions provide concrete examples. In connection with both its former Cuban and Vietnamese branch operations, expropriated by revolutionary governments, Chase has faced claims in U.S. courts by former depositors of such branches, a) after the branches' assets and liabilities had been nationalized by a new government and b) after the deposit balances in a foreign branch had been turned over to a new government authority pursuant to demand. In these cases, Chase was confronted with the possibility of double liability for deposits by reason of its compliance with a local law. In fact, Chase - and undoubtedly many other U.S. companies in similar circumstances - was spared the consequences of double liability, because it was protected by the act of state doctrine which precluded U.S. judicial examination of the lawfulness of the taking of Chase's assets in a foreign country by a foreign sovereign.

By contrast, if S. 1434 had been law, the risk of double liability would have been increased greatly, since in this situation a United States court would have been required to determine the validity of such confiscatory measures under the vague standards of international law. If a court had determined that the seizure violated international law, it then could have imposed on the U.S. bank a liability for deposits that in fact had already been confiscated by and paid over to a foreign government. Faced by a demand for repayment by a former depositor, the bank would have been stripped of its defense that it had paid his deposit over to the expropriating government in accordance with a legal obligation. The unfairness of such a result is clear.

American banks would not, of course, be the only businesses faced with such discouraging possibilities should S. 1434 be enacted. Any business holding assets abroad for the account of another could face the same potential double liability and the same dilemma: comply with the foreign law and face liability at home; or refuse to comply with foreign law and face punishment abroad.

Adding to the risks and uncertainties faced by American companies doing business abroad is unwise and inconsistent with the national interest. At a time when the relative strength of American business in world markets is declining and when anxiety about the ability of the economy to assure prosperity is widespread, our laws should encourage - not discourage - the expansion of U.S. enterprise abroad. S. 1434, however, would create new inhibitions by introducing further legal unknowns.

Other considerations also favor the continued availability of the act of state doctrine. Judicial examination of acts of foreign governments could complicate the conduct of U.S. foreign policy and the protection of U.S. national interests. A determination that foreign expropriations and other actions are lawful, or at least not unlawful, may undercut the credibility of our government in opposing them. A determination that they are unlawful may interfere with U.S. efforts to rehabilitate strained relations with countries that, with little appreciation for the concept of an independent judiciary, attribute any court pronouncement to the executive branch.

In the foreign policy arena, the act of state doctrine serves as a flexible doctrine of judicial restraint. The value of maintaining the doctrine's flexibility was recognized by Justice Rehnquist in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972):

> The Act of State doctrine, as reflected in the cases culminating in Sabbatino, is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forego decisions on the merits of their claims because involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy. (406 U.S. at 769-770).

Such an approach permits consideration of the implications of the separation of powers between the judicial and executive branches, as well as the interests of individual litigants, on a case-by-case basis, and helps avoid the imposition of unwarranted inequities on any party. We must face the fact that, in a world in which the rule of law is at best a secondary consideration for many governments, our nation's foreign policy interests may occasionally outweigh an individual litigant's right to judicial resolution of a dispute.

The enactment of S. 1434 would produce a serious, perhaps insoluble problem for our courts. While Chase recognizes that one laudable goal of the legislation is to promote the development of international law, that body of norms and rules remains imprecise on most questions. Indeed, Justice Harlan, writing for the Supreme Court in the _Sabbatino_* case, made it quite clear that no international consensus existed on the law of expropriation. If S. 1434 becomes law, overburdened U.S. courts will be enmeshed in a type of inquiry known for its difficulty, length and consumption of resources.

Moreover, if S. 1434 is enacted, litigants in U.S. courts, facing the possibility of double liability, will be placed in the perverse position of having to argue _in favor of_ the validity of foreign governmental expropriations under international law standards. The courts themselves, faced with the unpalatable task of imposing such liability, may tend - especially in view of the imprecision of international law - to strain toward upholding those arguments. It would be highly unfortunate if S. 1434, in the name of promoting international justice, launched a trend toward legitimizing arbitrary acts by foreign governments.

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* _Banco Nacional de Cuba v. Sabbatino_, 376 U.S. 398 (1964).

Chase welcomes examination of the act of state doctrine, because we believe its efficacy and fairness will be demonstrated. In any event, virtual abolition of the act of state doctrine without a full exploration of what should replace it, is not the best way to proceed. Although the doctrine is imperfect, it is preferable to the unknown state of the law that existed before the Supreme Court held in Underhill v. Hernandez, 168 U.S. 250 (1897) that U.S. courts would not examine the validity of acts of foreign governments committed within their own territories. To reverse eighty years of act of state jurisprudence by the enactment of S. 1434 would sacrifice the relative certainty on which American businessmen abroad have come to rely and subject them to the risk of double liability, all in pursuit of an idealized but unattainable condition in which American courts are free to apply their own concept of international law to the acts of foreign states.

STATEMENT OF EXXON CORPORATION ON S. 1434

Senator Mathias has introduced as S. 1434 his bill (formerly S. 2633) to eliminate the bar of the act of state doctrine to certain adjudications on the merits. The operative provision is Section 3 which would add to Title 28 a new Section 1657 providing:

> "No court in the United States shall decline on the ground of the Federal act of state doctrine to make a determination on the merits in any case in which the act of state is contrary to international law."

Section 620(e)(2) of the Foreign Assistance Act of 1961 (22 USC 2370(e)(2)), the so-called "Sabbatino amendment", would be repealed. Hearings on the bill were held on September 14 before the Subcommittee on Criminal Law of the Senate Judiciary Committee. This statement is filed for the record of the hearings in opposition to the bill.

The most important argument against the bill is that it attempts a legislative limitation of the exercise of judicial discretion and flexibility in the already complex area of foreign relations. This bill would force the courts in many cases to participate in the sensitive and difficult conduct of our country's foreign relations, an area of government where they have usually deferred to the political branches.

Background of the Act of State Doctrine

The act of state doctrine counsels U. S. courts to refrain from examining the validity of acts of foreign states within their jurisdiction. The most quoted formulation of the act of state doctrine was set forth in Underhill v. Hernandez[1] in 1897:

> "Every sovereign state is bound to respect the independence of every other sovereign state,

> and the courts in one country will not sit in judgment on the acts of a government of another state done within its own territory."

Aside from traditional conflict of laws analysis, the most important policy underlying the doctrine is that of judicial restraint based on the fear that a judicial declaration of the validity or invalidity of a foreign sovereign's act might conflict with the position of the Executive or otherwise interfere with or embarrass the conduct of foreign relations by the Executive.

A number of commentators have suggested that this policy of judicial restraint and deference to Executive Branch decision mirrors the doctrine that a political question may make a case nonjusticiable. In turn, other courts and commentators have emphasized the underlying concept of the separation of powers provided by the Constitution. The two concepts are closely related. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court, in holding that the political question doctrine did not bar its consideration of the misapportionment case before it, stated that that doctrine essentially followed from the separation of powers under the Constitution. Indeed, although Justice Harlan in Sabbatino[2] held that the act of state doctrine was a "principle of decision ... compelled by neither international law or the Constitution", his opinion refers to the "constitutional underpinnings" of the act of state doctrine and, inferentially, to the close similarity of acts of state to nonjusticiable political questions.

This strand of judicial deference to the Executive Branch on those acts of state resembling political questions is also reflected in the so-called "Bernstein exception" to the act of state doctrine. The "Bernstein exception" is derived from Bernstein v. N.V. Nederlandsche-Amerikaansche.[3] In this case, the plaintiff, a German Jew, sued a Dutch corporation which had received property confiscated from the plaintiff by the Nazis. A Second Circuit decision permitted the plaintiff to challenge the validity of the German government's expropriation of his property within German territory relying upon State Department advice that foreign relations considerations did not require the act of state doctrine to be applied.

The Department of State has in other cases advised courts that considerations of foreign policy do not require the application of the act of state doctrine. This policy of judicial deference to Executive suggestion was the basis of Justice Rehnquist's opinion in Citibank.[4] In Dunhill,[5] Justice White found the Executive suggestion to be persuasive, although none of the justices apparently considered that such advice was conclusive. One is inclined to agree that in any event "the views of the State Department are likely to carry considerable weight with the Court in the future".[6]

In response to such considerations, the so-called Sabbatino amendment to the Foreign Assistance Act of 1961 (22 USC 2370(e)(2)), which presently can bar U.S. courts from declining on act of state grounds to make a determination on the merits in certain cases, carefully provides that its provisions shall not be applicable "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

A recent instance of the application of the act of state doctrine was in International Association of Machinists v. OPEC[7], decided by the U.S. Court of Appeals for the Ninth Circuit on July 6, 1981. The Machinists Union sued OPEC and its member nations alleging that their price-fixing activities violated United States anti-trust laws. The Court of Appeals affirmed the judgment of dismissal of the complaint on the grounds that under the act of state doctrine, exercise of jurisdiction would be improper. In its opinion by Judge Choy, the Court of Appeals said in part:

> "The act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state.
>
> The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or experdition. When the courts engage in piece-meal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world."

The proposition that the act of state doctrine of itself encourages foreign governments to engage in arbitrary and unreasonable actions against U.S. businesses doing business abroad is not persuasive. The doctrine reflects the commonsensical proposition that the foreign state is sovereign within its territory. (In this context, almost all jurisdictions subscribe to the concept of acts of state.) Protection against foreign governmental takings of property in contravention of international law is presently available under the Sabbatino amendment. The current proposal which would encourage U.S. courts to upset or to refuse recognition to any foreign governmental action alleged to violate international law could itself greatly impede and hinder the conduct of U.S. business abroad by denying finality and certainty to such transactions taken in reliance upon foreign law or governmental action.

Other Problems

There are a number of other problems with the proposed bill:

(1) There is much of value in existing legislation such as 22 USC 2370(e)(2), which the bill would repeal, and in the large body of judicial interpretation of the act of state doctrine which now provide a measure of predictability in many commercial situations. Many of these issues have been considered by the Supreme Court and other appellate tribunals, and wholesale change could create very significant confusion.

(2) As a definition of "international law", the bill incorporates by reference Article 38 of the Statute of the International Court of Justice which talks about treaties, custom and "general principles of law". It is uncertain how this would be applied by U.S. courts.

(3) The bill purports to leave unmodified "the foreign sovereign compulsion defense" which it does not attempt to define. Although one might agree with the draftsman's decision not to attempt definition of this complicated defense, this provision could raise the issues of territoriality, motive and other asserted "limitations" or "exceptions" to this defense. It is also difficult to accept the premise of the bill that the defense is "conceptually and legally separate and distinct" from the act of state doctrine.

(4) The bill does not limit the application by the courts of conflict of laws principles, principles of comity, and other guides to both jurisdiction and judicial decision, but the danger exists that some courts may interpret the legislation incorrectly as barring their exercise of discretion in such related areas. Such possibility undercuts the argument of some supporters that the bill is "harmless" since it does not expressly apply to these related principles.

Statements by the Executive Branch

The Honorable Davis Robinson, Legal Adviser, Department of State, and Carolyn Kuhl, Esq., Special Assistant to the Attorney General, Department of Justice, presented cogent criticisms of S. 1434 at the September 14 hearings. In June 1980, a House of Representatives Commerce Subcommittee received testimony on HR 4661, a bill introduced in 1979 by Rep. Gore, which resembled the present bill in attempting the limitation of the act of state doctrine. On this bill, Mr. John Shenefield noted for the Department of Justice that "because the act of state defense turns on fine distinctions to be made in complex factual situations, we oppose its limitation in antitrust cases by legislative means at this time. The determination as to the appropriateness of the application of the act of state doctrine is particularly suitable for case-by-case development by the courts rather than by the use of specific legislatively mandated rules imposed on the courts." Mr. William Lake for the Department of State questioned the desirability of the bill's provisions concerning the act of state doctrine, the foreign sovereign compulsion defense, and jurisdiction of the courts in cases of conflict with foreign law. The principal reason was that "the courts are in the best position to resolve such an issue on the basis of all the facts and considerations involved in a particular case . . . It would be almost impossible to anticipate all of the factors that might be relevant in a particular case".[8]

Conclusion

It is respectfully submitted that the present record and current judical interpretations of the act of state doctrine fail to demonstrate any need for the far reaching changes in U.S. law which S. 1434 would introduce.

Footnotes

1. *Underhill v. Hernandez*, 168 U.S. 250 (1897)
2. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)
3. 210 F.2d 375 (2d. Cir. 1954), modifying 173 F.2d. 71 (2d. Cir. 1949)
4. *First National Citibank v. Banco Nacional de Cuba*, 406 US 759 (1972)
5. *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).
6. See "Comment.: The Act of State Doctrine: A History of Judicial Limitations and Exceptions", 18 Harv. Int. L.J. 677, 690 (1977)
7. CCH 1981-1 Trade Cases, ¶64, 143 (9th Cir. 1981).
8. Statements, Mr. John Shenefield, Mr. William Lake, at Hearings, House Commerce Consumer Subcommittee, June 24, 26, 1980.

BEST COPY AVAILABLE

Patrick J. Mulhern
Senior Vice President
and General Counsel

CITIBANK

October 5, 1981

The Senate Judiciary Subcommittee on
Criminal Law
Russell Senate Office Building
Room 162
Washington, D.C. 20510

Attention: Carolyn Lewis

Dear Mr. Chairman and Members,

We respectfully ask that this letter be added to the record of the hearings held on September 14, 1981, on S. 1434, - "the International Rule of Law Act" - so that the contents can be considered along with the testimony of others. Citicorp is engaged in business in 95 countries of the world through approximately 1,900 offices. Both by reason of the geographical scope of our businesses and by reason of the nature of the financial services industry we are greatly exposed to conflicting or contradictory actions by sovereign nations. Citicorp is vitally interested in the subject matter of the proposed International Rule of Law Act. It is extremely important to us, to other American financial services companies active abroad and to American business that the Act of State Doctrine be extremely carefully analysed in all of its complexity before action is taken to define by legislation its parameters and norms for its application by American courts. We are grateful that Senators Mathias and Domenici have, by introducing S. 1434, provided the occasion for careful review of the Act of State Doctrine, despite the fact that we have very serious reservations about the present content of the bill.

In its present form, this laudable attempt to restrict application of the Act of State Doctrine would threaten United States commercial, industrial and financial interests. As drafted, it fails to take into account certain wholesome, and inescapable, aspects of the Act of State Doctrine that should not be sacrificed in an effort to curb other unwholesome and unnecessary effects.

The essence of the doctrine is that a court in the United States will not undertake to adjudicate the validity of an act of state fully executed within the territory of the acting sovereign. In its essence, therefore, it is no more than judicial recognition of the territorial imperatives of sovereignty. Unfortunately, in many instances the doctrine has been misapplied as a bar to adjudication under national or international law of the consequences of an act of state outside the territory of the acting sovereign, as distinct from its validity or effect within such territory. As a result, a doctrine designed to recognize the territorial integrity of a friendly foreign sovereign threatens an invasion of United States sovereignty.

It may well be necessary for Congress to act in order to preclude injurious extrapolations of the act of state doctrine. It is not in the interest of the United States, however, to jeopardize the sound structure of the doctrine in the course of excising malignant growths. Curative legislation must follow and be consistent with identification of the legitimate scope of the act of state doctrine. That exercise requires, in respect of any case or controversy, attention to the following considerations.

First, both conceptually and pragmatically the doctrine applies only to acts fully executed within the territory of the acting sovereign. Judgment by a foreign court that such acts are invalid or ineffective is (a) an invasion of the internal affairs of the acting sovereign and (b) is beyond the power of the tribunal to enforce. It is clear that the normal processes for implementation of the judgment of a foreign court are not effective outside its territorial jurisdiction. A judgment, that the act of a foreign sovereign fully executed within its territory, is a nullity or otherwise ineffective, cannot be executed in the territory of the foreign sovereign. Nor is such a judgment self-executing in the territory of any other foreign sovereign. Therefore, the judgment of a national court, in disregard of the act of state doctrine, will not be given effect in the territory of a third country whose jurisprudence regards the act of state doctrine as a bar to adjudication. On the other hand, a national court having jurisdiction can properly adjudicate the claims of a party who asserts that his rights under international law were violated in consequence of an act of state fully executed within the territory of the acting sovereign, even though the court does not call in question the validity of the act itself. Such a judgment is clearly enforceable within the territorial jurisdiction of the court that renders it and could well be an acceptable basis for legal proceedings in third countries.

Second, the character and status of the party asserting the act of state doctrine as a bar to adjudication is relevant. When a foreign state (or its agent or instrumentality) is properly subject to the jurisdiction of a court in an action in which a remedy is sought for a violation of internatinal law, the state should not be permitted to divest the court of jurisdiction by asserting that the consequences of its alleged violation of international law are damnum absque injuria because occasioned by its own sovereign act or omission. On the other hand, a litigant other than the sovereign actor should not be denied the benefit of defenses or claims based on generally accepted principles of conflict of laws, on the ground that third parties committed or were the victims of a violation of international law. See, e.g., Salimoff & Company v. Standard Oil Company 262 N.Y. 220, 186 N.E. 690 (1933); Trujillo-M v. Bank of Nova Scotia, 51 Misc. 2d 689, 273 N.Y.S. 2d 700 (1966); aff'd, 29 A.D. 2d 847, 288 N.Y.S. 2d 81, cert. denied 393 U.S. 982 (1968).

Keeping in mind the foregoing principles, we believe there are serious flaws in the Bill.

1. In a case in which the specific act of state is not clearly "contrary to international law", a court may find itself inhibited from "making a determination on the merits" of the rights of the aggrieved party, even though such rights exist

under international law. See, e.g., the recent decision of the Second Circuit in the Lamborn case, Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lambarn & Company, 652 F. 2d 231 (1981). On the other hand, if the act is found to be contrary to international law, a court may find that a determination on the merits, e.g., that the act is invalid and of no effect, requires denial of rights (claims or defenses) of innocent third parties. The proponents of the Bill obviously were aware of and sought to exclude this possibility in Section 5, but, for the reasons we describe further on, we believe Section 5 does not achieve this.

2. The definition of international law in Section 4 is troublesome. The reference to the Statute of the ICJ may be satisfactory granted the present perceptins of international law. The persistent efforts, in the United Nations and elsewhere, to alter international law as perceived by the United States and nations which share its views, make this an unstable standard and there must be serious doubt as to whether unilateral legislation, whether by the Congress of the United States or the legislative bodies of other countries, would be effective. Futher, the Bill's identification of sources of international law threatens the ability of the Executive Branch to discharge its constitutional mandate with respect to the conduct of foreign policy. The parameters of the so-called Bernstein exception to the act of state doctrine are, at present, far from clear. Any Congressional direction to the judicial branch, in respect of the latter's construction and application of international law should therefore provide that the views of the Executive should be received and given due weight.

3. Section 5 recognizes but does not solve the problems of a private litigant who should properly be able to rely on the act of state doctrine as a defense. Some critics of the act of state doctrine have expressed the view that one dispossessed of property in violation of international law should be allowed to recapture the property. Adoption of any proposal that would implement that view is not in the interest of the United States, nor, indeed, in the interest of those who might seem, superficially, to be its immediate beneficiaries.

Adoption of the concept that an act of state in violation of international law, even though fully executed within the territory of the acting sovereign, clouds title of affected property, would bring chaos to commerce. It would impose on merchants and financers an impossible burden of monitoring and pre-determining the legality of sovereign acts, most of which may not presumptively be in violation of international law. Indeed, the very groups that are the designated beneficiaries of such a rule would become its victims. For example, assume that in flagrant violation of international law country A confiscates a coffee plantation owned by X, a national of country B. Z, a national of the United States, buys coffee beans from Y, a national of country C. Those beans prove to be produce of the plantation formerly owned by X. X thereupon institutes an action against Z, in the courts of the United States to replevy the beans or to recover damages for conversion.

Although the present form of the Bill preserves the so-called "foreign sovereign defense" and thus affirmatively recognizes the threat to private United States interests of an indiscriminate curtailment of the act of state doctrine, the Bill leaves in jeopardy those United States persons whose activities are affected, but not directly compelled, by acts of state over which they have no control.

These are some of the problems posed by S. 1434 which are apparent to us. Others have pointed out different troublesome areas or different aspects of those noted above. We are certain that further reflection on the possible effects of the presently proposed provisions on myriad fact situations would show additional unintended results. Citicorp supports those others who have urged in their testimony or written comments that this Bill not be adopted, but that a more comprehensive and careful review be undertaken of the act of state doctrine and its ramifications. We suggest that, in place of the Bill, the subcommittee should provide for a more complete review of the proper scope of and actual effects of the act of state doctrine in view of a carefully prepared codification. Until such a codification can be adopted, we believe it more in the interest of the United States to live with imperfections than to risk unknown results of an attempt to repair one of those imperfections.

We appreciate very much the Subcommittee's having held the record open to allow wider expression of views.

Yours respectfully,

Patrick J. Mulhern
Senior Vice President
and General Counsel